

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TERRITORY OF GUAM,)
 Petitioner,)
 v.) No. 20-382
UNITED STATES,)
 Respondent.)
- - - - -

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GREGORY G. GARRE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	VIVEK SURI, ESQ.	
7	On behalf of the Respondent	32
8	REBUTTAL ARGUMENT OF:	
9	GREGORY G. GARRE, ESQ.	
10	On behalf of the Petitioner	55
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:47 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 20-382, Territory of Guam
5 versus United States.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The United States made a strategic
12 decision to steer the cleanup of the Ordot Dump
13 away from CERCLA and to sue Guam -- and sue Guam
14 under the Clean Water Act instead, no doubt to
15 insulate itself from liability for its own role
16 in building and using the dump. Yet, now the
17 United States claims that the parties' Clean
18 Water Act settlement nevertheless triggered a
19 CERC -- a CERCLA contribution claim, a claim
20 under the very statute it sought to avoid.

21 That's wrong for two independent
22 reasons. First, Section 113(f)(3)(B) of CERCLA
23 requires a resolution of CERCLA liability to
24 trigger a CERCLA contribution claim.
25 Section 113(f)(3)(B) is part of an integrated

1 CERCLA contribution provision. Read in context,
2 the phrase "resolved its liability" naturally
3 refers to CERCLA liability, and that reading
4 squares with traditional contribution
5 principles, which require the resolution of a
6 common liability. The common liability that
7 triggers a CERCLA contribution claim is CERCLA
8 liability.

9 The United States' contrary
10 interpretation depends upon construing
11 Section 113(f)(3)(B) as if it were an island
12 ripped from its context. It creates the
13 untenable result that the meaning of the phrase
14 "resolved its liability" changes from one
15 paragraph of Section 113(f) to the next. And it
16 manufactures an unprecedented contribution right
17 that does not require a common liability and can
18 be triggered even when the defendant is immune
19 from liability in the settled claim, as the
20 United States was here. None of that makes any
21 sense.

22 And, second, the United States'
23 position also fails because the parties' Clean
24 Water Act settlement simply does not resolve
25 Guam's liability for a response action. Under

1 the plain terms of the decree, Guam was just as
2 exposed to liability for a response action after
3 the decree as it was before, including under
4 CERCLA itself.

5 I welcome the Court's questions.

6 CHIEF JUSTICE ROBERTS: Mr. Garre,
7 under -- the position of the United States
8 points out -- points out an incongruity in -- in
9 your position, which is that you want to imply a
10 term like "under CERCLA" into Section 113, but
11 you're bringing this -- the case under
12 Section 107 yourself, where you don't want to
13 imply such a term.

14 I just wanted to make sure I have your
15 response to that.

16 MR. GARRE: Well, the question is
17 whether the settlement of the Clean Water Act
18 triggered a contribution right under
19 Section 113(f)(3)(B), and that depends on
20 whether or not it resolves liability under
21 CERCLA.

22 I don't think there's any
23 inconsistency in our view. Everybody agrees
24 that if the settlement didn't trigger 113(3) --
25 (f)(3)(B), then we are entitled to proceed under

1 Section 107(a) for the recovery of costs.

2 CHIEF JUSTICE ROBERTS: You articulate
3 this theory of statutory interpretation that
4 centers upon what you call an anchor provision,
5 and I'm -- I'm not quite sure where that fits in
6 our sort of list of statutory guidelines.

7 I -- I gather it's not quite a defined
8 term, but it's also not a term of art. What's
9 the best authority that you can point me to
10 where you have the kind of analysis that you're
11 asking us to adopt here?

12 MR. GARRE: Well, I would point you to
13 the cardinal rule that provisions have to be
14 construed in context and in light of their
15 surrounding provisions. So, here, 113(f)(3)(B)
16 is part of an integrated CERCLA contribution
17 provision, and it makes sense to read the
18 language, the key phrase "resolved its
19 liability," and how that is used throughout the
20 statute.

21 And if you look at 113(f), it starts
22 by establishing in (f)(1) the liability that --
23 that matters, and that's CERCLA liability. And
24 then, in each provision thereafter, it uses the
25 phrase "resolved its liability."

1 And the government doesn't dispute
2 that "resolved its liability" in (f)(2) means
3 CERCLA liability, and there's no reason it would
4 have any different meaning in (f)(3)(B).

5 And I think that's perfectly
6 consistent with the rule of context, that this
7 always applies, and that the abnormal rule here
8 is the one asserted by the government, which is
9 that you should just take this provision and
10 construe it as if it were an island in a vacuum
11 without regard to its surround -- surrounding
12 provisions.

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas.

15 JUSTICE THOMAS: Thank you, Mr. Chief
16 Justice.

17 Mr. Garre, is there any other instance
18 in which -- that you can think of where the
19 parties reach a settlement and then they turn
20 around and sue each other over the very same
21 problem?

22 MR. GARRE: Well, I mean, there --
23 there's certainly other instances that trigger a
24 contribution claim, Your Honor, and -- and I
25 think, you know, one of the incongruities here

1 is that the -- the United States is not subject
2 to suit under the Clean Water Act. So the whole
3 notion that that settlement would trigger a
4 contribution claim is at war with basic
5 principles of contribution, which this Court has
6 recognized Congress adopted in Section 113(f).

7 JUSTICE THOMAS: But aren't you going
8 to have a problem even if you get beyond the
9 statute of limitations? If you say that CERCLA
10 is contained, then why would you bring a Clean
11 Water Act claim under CERCLA?

12 MR. GARRE: Well, I mean, you couldn't
13 -- I mean, certainly -- I don't think that
14 situation would arise, Your Honor, if I
15 understand the question. I mean, here, the
16 United States has -- it could have certainly
17 pursued a claim under CERCLA. It didn't in
18 order to insulate itself from liability. And so
19 it brought the claim under the Clean Water Act.

20 And our position is consistent with
21 traditional principles of contribution that the
22 settlement of that claim didn't trigger a CERCLA
23 contribution right, which we think follows from
24 the terms of the statute as well.

25 JUSTICE THOMAS: Have there been other

1 instances in which other -- claims under other
2 provisions were then brought under CERCLA for
3 contribution purposes?

4 MR. GARRE: Well, I mean, there's some
5 cases that have arisen in the circuits, Your
6 Honor, but, I mean, up until relatively recent,
7 I think that the position was that you would
8 expect a -- a CERCLA claim to trigger CERCLA
9 liability.

10 I mean, it wasn't until, I think, 2013
11 that a circuit first adopted the contrary rule,
12 and it just throws in a wrench into the whole
13 way in which this provision was intended to
14 operate and creates numerous anomalies,
15 including giving the phrase "resolves its
16 liability" a different meaning throughout the
17 statute.

18 JUSTICE THOMAS: But the contribution
19 you're seeking comes from Clean -- the Clean
20 Water Act. That's what I'm getting at. That's
21 -- if -- if you're saying the statute of
22 limitations shouldn't apply -- should be
23 contained under CERCLA, then why would you be
24 bringing a claim from the Clean Water Act for
25 contribution under CERCLA?

1 MR. GARRE: We're not, Your Honor.
2 We're -- we're -- we're bringing a cost recovery
3 claim under Section 107(a) of CERCLA. The
4 government's position is that we were required
5 to bring a contribution claim in the wake of the
6 Clean Water Act settlement.

7 So it's really the government's
8 position that creates the anomaly there.

9 JUSTICE THOMAS: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.

12 JUSTICE BREYER: Thank you.

13 If we got to the second question, I
14 think your position is that a settlement
15 requires -- for the purposes of this Act, it
16 requires that there be an express admission of
17 liability. Why?

18 I mean, people settle cases all the
19 time where -- where they're not going to admit
20 they were liable, but they might agree to take
21 actions of X, Y, or Z in the future, and they
22 might -- somebody might without -- do the same
23 thing here.

24 MR. GARRE: Right. And that's not our
25 position, Justice Breyer. We don't make the

1 argument that you have to admit that the claim
2 was valid. And -- and, here, you know, we don't
3 have a modern issue clause.

4 JUSTICE BREYER: What is the argument?

5 MR. GARRE: What we have is a clause
6 saying there was no finding of liability. But,
7 fundamentally, on the second question, the
8 problem with the settlement is it doesn't
9 extinguish any liability.

10 The settlement explicitly gives the
11 United States the option to pursue, you know,
12 any and all claims under any law for the same
13 conduct in the same actions that were settled
14 here, and that's atypical. The United States
15 modeled --

16 JUSTICE BREYER: So could they bring
17 it under CERCLA again?

18 MR. GARRE: Excuse me, Your Honor?

19 JUSTICE BREYER: They could bring the
20 CERCLA claim -- the CERCLA claim again?

21 MR. GARRE: Yeah. Yes. I mean, in
22 paragraphs 47 and 48 --

23 JUSTICE BREYER: So then what did you
24 get out of your agreement? Nothing?

25 MR. GARRE: Well, Your Honor, the one

1 thing that it resolved was the Clean Water Act
2 penalties, which are statutory penalties that
3 can add up. But it didn't resolve any liability
4 with respect to a response action.

5 And, in fact, you know, once this
6 action was taken to cap the dump, the United
7 States in theory could come back and sue under
8 CERCLA the next day and say, well, you know
9 what, we thought about it some more, we think
10 you should tear up and remove the waste
11 altogether.

12 This settlement didn't resolve any
13 liability. And, again, that's atypical because,
14 if you look at the model consent decree, it
15 includes a covenant not to sue, except for
16 future unknown conditions.

17 But the settlement here left Guam
18 exposed to liability under any law with respect
19 to any claim involving a response action.

20 And so, for that reason alone, we
21 would urge you to rule for us on the second
22 question presented.

23 JUSTICE BREYER: I see. Okay. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: I'd like to ask you a
2 question about what you see as the relationship
3 between Section 113(f)(1) and 113(f)(3).

4 So 113(f)(1) provides contribution
5 action to offset CERCLA liability and does so
6 "during or following any civil action" under 106
7 or 107.

8 Then paragraph 2 makes it clear that
9 those who settle their liability won't be
10 subject to a contribution action from the
11 matters addressed in the settlement.

12 And then what does 113(f)(3)(B) add?
13 Aren't judicially approved settlements already
14 covered by the phrase "following any civil
15 action" in paragraph 1?

16 MR. GARRE: Right. So, Your Honor,
17 where -- it covers the situation where there's
18 no pending litigation, the parties voluntarily
19 agree to settle with the United States or a
20 state, and then they go to court to judicially
21 approve that. And so I think, in that instance,
22 it would make sense for Congress to spell out
23 what happens with respect to such a settlement.

24 And I would add, with respect to the
25 superfluidity argument by the United States, I

1 mean, this also covers administrative
2 settlements. And so that wouldn't be covered at
3 all by (f)(1). There would be no pending
4 litigation.

5 I think that, once Congress is going
6 to spell out what happens in the case of
7 administrative settlement, I think it only makes
8 sense for it to spell out what happens in the
9 case of a judicially approved settlement where
10 there had been no prior litigation.

11 And if that's a little bit
12 belts-and-suspender, that's something that this
13 Court has recognized Congress has done elsewhere
14 in CERCLA. And I think it made perfect sense,
15 Your Honor.

16 JUSTICE ALITO: What should we make of
17 the fact that paragraph 3(c), (f)(1)(3)(C),
18 refers to -- I'm sorry, (f)(3)(C), refers to any
19 contribution action brought under this paragraph
20 and sets its own requirement that such actions
21 "shall be governed by" federal law?

22 If Congress meant for all -- all the
23 details in paragraph 1 to carry through to the
24 other paragraphs, including 3, why would it have
25 needed to include that language?

1 MR. GARRE: Well, I mean, I think what
2 it does is it tells you that the -- the -- the
3 federal -- the -- the CERCLA contribution claim
4 is a federal claim, and so it would other --
5 override other provisions.

6 And that's one of the problems that
7 the state amici addressed and that the
8 government's interpretation would mean that,
9 anytime you settle a non-CERCLA claim under
10 state law, it would trigger this federal
11 contribution claim and, therefore, override
12 states' different cost recovery regimes, which
13 is a direct intrusion that this Court would not
14 presume that Congress intended unless it said
15 so.

16 So I think the fact that Congress
17 spelled out the contribution actions brought
18 under federal law, you know, is quite
19 significant in pointing to the conclusion that
20 Congress didn't mean this strange contribution
21 right the -- that the United States says it
22 created.

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Mr. Garre, I think
2 it's your second question presented that may
3 have created my colleague, Justice Breyer's
4 confusion, because it was my own.

5 Your question asks whether a
6 settlement that expressly disclaims any
7 liability determination and leaves the settling
8 party exposed to future liability can trigger a
9 contribution claim under CERCLA, Section
10 113(f)(3)(B).

11 Settlement agreements often can
12 disclaim liability but resolve liability at the
13 same time. Many settlement agreements will say,
14 I don't admit liability, but I will resolve my
15 liability under your claims under the Clean
16 Water Act.

17 That's what happened here, correct?

18 MR. GARRE: Well, yes and no. I mean,
19 they -- they did say that there was no finding
20 of liability, Your Honor.

21 JUSTICE SOTOMAYOR: Right, but it --

22 MR. GARRE: But, fundamentally --

23 JUSTICE SOTOMAYOR: -- it still
24 resolved the Clean Water Act claims, correct?

25 MR. GARRE: They didn't resolve

1 liability, Your Honor, because the sudden --

2 JUSTICE SOTOMAYOR: It resolved the
3 claims, counsel, not the liability, but the
4 claims, correct?

5 MR. GARRE: Well, no. I mean, the
6 claims themselves were conditioned on compliance
7 with the decree. And that's in paragraph 45.

8 JUSTICE SOTOMAYOR: Counsel, you're
9 quibbling with words. You got some value out of
10 it. You got away from some damages that you
11 were fearful of. So it resolved something,
12 correct?

13 MR. GARRE: Well, that's -- you're
14 absolutely right.

15 JUSTICE SOTOMAYOR: All right. Now,
16 Mr. Garre, consider that, could I have, if that
17 -- if that settlement had said this agreement
18 resolves Guam's legal obligations under all
19 federal environmental statutes. By the way,
20 that was very comparable to most general
21 releases. This settlement resolves all claims
22 arising from, related to, whatever the complaint
23 is, known or unknown. That's the typical
24 general release.

25 If it had been a general release like

1 that, would you have any arguments in this case?

2 MR. GARRE: The argument would be much
3 different. And I think that probably would
4 resolve liability. And that's what's missing
5 here, Your Honor, is --

6 JUSTICE SOTOMAYOR: That never --

7 MR. GARRE: -- a general release --

8 JUSTICE SOTOMAYOR: -- resolves
9 liability.

10 MR. GARRE: -- covenant not to sue
11 and --

12 JUSTICE SOTOMAYOR: Those general --
13 counsel, Mr. Garre, those general releases,
14 that's your strongest argument, which is --

15 MR. GARRE: I agree. I mean, I think
16 --

17 JUSTICE SOTOMAYOR: Yeah.

18 MR. GARRE: -- all the provisions work
19 together, Your Honor, but I agree that release
20 -- that the lack of any covenant not to sue and
21 the way in which the -- the settlement preserves
22 the right to bring suit under any claim, I mean,
23 that's very unusual, and that defeats a finding
24 that it resolves liability.

25 The resolution of liability is a

1 two-way street. Guam agreed to do some things
2 here, but the United States never relinquished
3 its claims to sue Guam for the very same
4 conduct, the very same actions here, and that's
5 made explicit in the decree.

6 The only thing that the settlement --
7 JUSTICE SOTOMAYOR: That's your
8 greatest -- that -- that's the great inequity
9 here, which is the U.S. retained the right to
10 sue you under the Clean Water Act.

11 So your argument is, we should have
12 the right to sue them, correct, for
13 contributions?

14 MR. GARRE: Not -- Your Honor, not
15 just the Clean Water Act but under any law --

16 JUSTICE SOTOMAYOR: I'm sorry, the --
17 the -- under CERCLA.

18 MR. GARRE: -- and not just paragraph
19 48.

20 JUSTICE SOTOMAYOR: Right.

21 MR. GARRE: And it's inequity in that
22 it --

23 JUSTICE SOTOMAYOR: Counsel, please.
24 Thank you.

25 MR. GARRE: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Justice Kagan.

2 JUSTICE KAGAN: Mr. Garre, I guess I
3 -- I'm wondering whether your anchoring argument
4 is -- is -- is really just an effort to make
5 lemonade out of lemons, and -- and the reason I
6 say that is because it's usually considered a
7 problem in statutory interpretation when one
8 provision, especially very close to another
9 provision, has very different language.

10 So, you know, (f)(1) says liability
11 under 9607 or 9606. And then (f)(3)(B) does not
12 say that but instead uses a very different
13 formulation, drops the section numbers, and says
14 liability for some or all of a response action.

15 So isn't the kind of obvious argument
16 here that (f)(3)(B) meant something different
17 from (f)(1)?

18 MR. GARRE: Right, and that -- that's
19 the reasoning of the D.C. Circuit, and what it
20 said was (f)(1) uses CERCLA language and
21 (f)(3)(B) doesn't. And it was incorrect about
22 that because (f)(3)(B) does use CERCLA --
23 CERCLA-specific language. It uses the terms of
24 our response action and response costs, which
25 actually track the references to 106 and 107 in

1 (f)(1).

2 But I think, Your Honor, you know,
3 fundamentally, what they skipped over is (f)(1)
4 spells out that the liability is under CERCLA.
5 And every other provision here within this
6 113(f) uses the phrase "resolved its liability."
7 And the government does -- doesn't dispute that
8 in (f)(2), when Congress said "resolved its
9 liability," it meant CERCLA liability.

10 And then, when -- it's only when you
11 get to (f)(3) that the government says "resolved
12 its liability" doesn't mean CERCLA liability; it
13 means liability under any law you could think
14 of.

15 JUSTICE KAGAN: But why -- why do we
16 necessarily think that (f)(2) is CERCLA
17 liability? (f)(2) says liability about matters
18 addressed in the settlement. I mean, you could
19 think that (f)(2) is more like (f)(3) than it is
20 like (f)(1).

21 MR. GARRE: Well, I mean, you should
22 ask the government that question because it's
23 never disputed our position that it has to be
24 CERCLA liability. If it were otherwise, then
25 (f)(2) would create this extraordinarily broad

1 immunity that a party could settle any claim
2 under any statute and yet receive this immunity
3 from contribution. The government has never
4 taken that position.

5 I mean, look, (f)(1) tells you that
6 the liability that matters is CERCLA when people
7 are suing each other. And the other provisions
8 deal with the question of what happens when
9 there's a settlement. And all this is against
10 the backdrop of common law contribution
11 principles --

12 JUSTICE KAGAN: Is -- is it possible
13 --

14 MR. GARRE: -- which require --

15 JUSTICE KAGAN: -- Mr. Garre, that --
16 that it makes perfect sense to -- to understand
17 (f)(1) differently from (f)(3)(B) just because
18 CERCLA is a statute that's designed to encourage
19 settlements, and if you take this settlement
20 provision to be broad -- if (f)(3)(B) is
21 broader, it would suggest that it would
22 encourage more settlements?

23 MR. GARRE: No, I don't think it's
24 going to encourage more settlements, Your Honor,
25 if people have to be worried about settling

1 non-CERCLA claims triggering CERCLA rights. And
2 I think all this has to be construed against
3 common law contribution principles, which
4 require a common liability, and a common
5 liability here is CERCLA liability.

6 And this Court has held that (f) --
7 113(f) is construed against common law
8 principles. And that rule itself requires the
9 conclusion that Congress meant the obvious,
10 which is --

11 JUSTICE KAGAN: Thank you, Mr. Garre.

12 MR. GARRE: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: Mr. Garre, just to
16 be clear, the -- there's no need for this Court
17 to touch the 107 question, is there?

18 MR. GARRE: Well, no, Your Honor,
19 there's not. I mean, that's a separate issue
20 that would go forward on remand.

21 JUSTICE GORSUCH: And so whether you
22 succeed or not is immaterial for the purposes of
23 this appeal?

24 MR. GARRE: Right. The only -- the
25 fundamental question here is whether or not the

1 Clean Water Act settlement required us to bring
2 a claim under (3)(B) --

3 JUSTICE GORSUCH: Yeah, I know that.

4 MR. GARRE: -- 113(3)(B).

5 JUSTICE GORSUCH: Right. I -- I
6 understand -- I understand why the SG wanted to
7 inject it in this case, but I also want to just
8 be clear that we don't have to touch it.

9 MR. GARRE: That's absolutely right,
10 Your Honor.

11 JUSTICE GORSUCH: Okay. And then can
12 you kind of explain for a moment your argument
13 about the preemptive effect of -- of the
14 government's position for state contribution
15 laws and what that would look like?

16 MR. GARRE: Sure, Your Honor. I
17 mean -- and it gets back to Justice Alito's
18 point that in 113(3)(C), the Congress provided
19 that a contribution action brought under this
20 paragraph shall be governed by federal law. So
21 that means that, if a person settles a claim
22 other than under CERCLA, under a state
23 provision, that that would trigger a federal
24 contribution right, which would preempt the
25 alternative regimes that states across the

1 country have adopted to deal with cost recovery
2 in this situation.

3 And, you know, the amici brief filed
4 by the states spells this out clearly. I mean,
5 that's a direct intrusion into state autonomy
6 that you wouldn't presume that Congress intended
7 when it adopted a CERCLA contribution provision.

8 JUSTICE GORSUCH: Well, I guess I just
9 want to understand better the magnitude of that,
10 the consequences and -- and practical
11 consequences of that and -- and why we wouldn't
12 assume that CERCLA meant -- meant to do exactly
13 that.

14 MR. GARRE: Well --

15 JUSTICE GORSUCH: So give me that if
16 you would.

17 MR. GARRE: -- Sure, Your Honor, and,
18 again, I think this gets back to what it means
19 to have a contribution claim. I mean,
20 ordinarily, you would try -- you would require a
21 common liability, so you would settle liability
22 for this, and you'd have a contribution claim
23 under the same liability.

24 And what the government's
25 interpretation does here is to import this, you

1 know, discrete CERCLA contribution claim as --
2 you know, into other federal statutes and to
3 override other state laws that deal with cost
4 contribution.

5 I mean, Congress ordinarily doesn't
6 create a contribution right, but, under the
7 government's interpretation, the settlement of a
8 claim other than CERCLA would trigger this
9 contribution right under CERCLA and effectively
10 import a contribution regime into other
11 provisions, under federal law, as well as state
12 law.

13 And that's very disruptive, and it's
14 hard to believe that Congress intended it. And
15 all of those problems are resolved by giving
16 this contribution provision its, you know,
17 normal meaning of requiring the resolution of a
18 common liability, which here would be CERCLA
19 liability.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.

23 JUSTICE KAVANAUGH: Thank you, Chief
24 Justice.

25 And good afternoon, Mr. Garre. Do you

1 -- or can you give me problems that you think
2 would result outside of this case if we adopted
3 the government's interpretation?

4 MR. GARRE: Well -- well, sure, Your
5 Honor. I mean, first is the trap for the unwary
6 that, you know, is -- is epitomized by this
7 case, that you would be settling a claim under a
8 different statute to which the United States
9 itself enjoys immunity, which is through the
10 Clean Water Act, and that somehow that
11 settlement would trigger a CERCLA contribution
12 right. So -- so -- so that in itself is a -- is
13 a problem that I think you would avoid unless
14 Congress was clear.

15 Another problem is, you know, the
16 problem with displacing contrary federal --
17 federal and state cost recovery regimes, which I
18 was discussing with Justice Gorsuch. I mean, I
19 think it also creates this unprecedented
20 contribution right, not known to the common law,
21 where you don't need a common liability where
22 the resolution of liability under one statute
23 somehow triggers a contribution right under a
24 different statute.

25 I mean, all of that is problems that

1 this Court can avoid by simply construing the
2 CERCLA contribution provision to be tied to
3 CERCLA liability.

4 JUSTICE KAVANAUGH: Thank you,
5 Mr. Garre.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Good afternoon,
9 Mr. Garre. I have a question just about how --
10 and I'm sure this comes with my ignorance of
11 CERCLA actions -- but how this works.

12 So 113(f)(3)(B) refers to response
13 action, you know, which is defined in, you know,
14 106 and 107, which talks about the ability of --
15 you know, the -- the section that you want to
16 sue the United States under, your ability to
17 recover action, cost of an action.

18 So, if there's not been an action, so
19 there's been no judicially determined amount of
20 response costs and there's been no
21 administrative or judicially approved
22 settlement, how does the court go about or -- or
23 how do the parties go about deciding whether
24 costs undertaken actually were response costs?

25 MR. GARRE: Well, Your Honor, I -- I

1 -- I hope this is responsive, but what would
2 happen is, like, typically, you'd either have
3 litigation among the parties over CERCLA
4 liability, and that would trigger the
5 contribution right in that forum --

6 JUSTICE BARRETT: Mm-hmm.

7 MR. GARRE: -- or the parties could
8 voluntarily settle with a -- a state authority
9 or the United States, in which case they could
10 spell out specific actions. And, ordinarily,
11 the EPA model itself would spell out that those
12 actions are taken under CERCLA.

13 Here, the United States proceeded
14 under the Clean Water Act, we think pretty
15 clearly, because it was immune from liability
16 itself under that Act, and that's really what
17 creates the, you know, unusual circumstances
18 leading to the United States' position here.

19 JUSTICE BARRETT: Well, I guess what
20 I'm getting at is trying to figure out how
21 CERCLA-specific this term, you know, "response
22 costs," is, I mean, because, as defined in
23 CERCLA, you know, the United States is right,
24 it's pretty broad. It can encompass a lot of
25 different things.

1 So what makes something a response
2 cost to CERCLA as opposed to, you know, just a
3 cost for something that wouldn't be covered by
4 CERCLA? And how do you know --

5 MR. GARRE: Right.

6 JUSTICE BARRETT: -- given the broad
7 definition of "response costs" and the fact that
8 the costs are undertaken not pursuant to any
9 sort of EPA rule necessarily?

10 MR. GARRE: Right. So you're right, I
11 mean, response action, response costs is a -- is
12 a well-known CERCLA term of art. And our
13 position under 13(b)(f)(B) is, like, what's the
14 liability for that? But what I would say, Your
15 Honor, one thing that's critical is, in order to
16 qualify as a response action and response costs,
17 the action or costs has to be incurred in
18 connection with the release of hazardous
19 substances.

20 And another thing that's unusual about
21 the Clean Water Act settlement here is it never
22 identified any hazardous substances included
23 within the definition of "response costs" or
24 action under CERCLA. It only identified
25 pollutants, the discharge of pollutants, under

1 the Clean Water Act, which is a different term
2 and doesn't necessarily include hazardous
3 substances under CERCLA.

4 And that's another reason why the
5 resolution of a party's Clean Water Act claims
6 could not have resolved liability for a response
7 action, a term defined by CERCLA.

8 JUSTICE BARRETT: Thank you,
9 Mr. Garre.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, Mr. Garre.

12 MR. GARRE: Thank you, Your Honor.

13 In our view, reading Section
14 113(f)(3)(B) in context and in light of
15 traditional principles of contribution compels
16 Guam's interpretation. But taking a step back,
17 here's what's at stake: adopting Guam's
18 interpretation would ensure that CERCLA's
19 contribution rule is CERCLA-contained.

20 It would give the phrase "resolves its
21 liability" the same meaning throughout Section
22 113(f). It would ensure that certain -- that
23 Section 113(f)(3)(B) does not indirectly
24 override states' own cost recovery rules, and it
25 would eliminate a trap for the unwary among

1 those settling non-CERCLA claims.

2 Conversely, it's hard to see any real
3 negative impact to the United States from ruling
4 in Guam's favor in this case, other than having
5 to pay its fair share for the Ordot cleanup.
6 Indeed, EPA's own model settlement agreements
7 give the United States a ready-made solution
8 should it lose this case.

9 In sum, Guam's interpretation is not
10 only right but is far better for the
11 implementation of CERCLA in the long haul.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Suri.

16 ORAL ARGUMENT OF VIVEK SURI

17 ON BEHALF OF THE RESPONDENT

18 MR. SURI: Mr. Chief Justice, and may
19 it please the Court:

20 Section 113(f)(3)(B) can give rise to
21 a contribution claim regardless of whether the
22 underlying claim arose under CERCLA or some
23 other statute. This follows most naturally from
24 the meaning of the words "liability for a
25 response action." The term "response action" is

1 defined in CERCLA in a way that does not depend
2 on which underlying statute that action was
3 undertaken in order to comply with.

4 In addition, CERCLA often uses the
5 term "response action" to include acts taken
6 under other statutes. If Congress wanted to
7 limit this provision to CERCLA liability, it
8 could easily have said so.

9 There are many other provisions of the
10 Act that use terms such as "settlement under
11 this Act," "liability under this Act," or
12 "response action under this Act." There's no
13 such limiting language in the provision at issue
14 here.

15 Turning to the second question, the
16 settlement here resolved Guam's liability. A
17 party resolves liability if it settles its legal
18 obligation to perform or pay for a response
19 action. That's exactly what the settlement here
20 did.

21 I welcome the Court's questions.

22 CHIEF JUSTICE ROBERTS: Counsel,
23 looking at (f)(2) entitled Settlement, the first
24 sentence there begins, "A person who has
25 resolved its liability to the United States."

1 Is that liability for anything, or is
2 that liability under CERCLA?

3 MR. SURI: It's neither of those
4 things, Mr. Chief Justice. It's liability for a
5 response action.

6 Now I acknowledge that (f)(2) is
7 probably the most difficult provision for us to
8 deal with, but let me explain why it's justified
9 to infer the term "for a response action" in
10 (f)(2) in a way that is not justified in
11 (f)(3)(B).

12 The first point --

13 CHIEF JUSTICE ROBERTS: Before you do
14 that, just -- you're -- you're explaining the
15 difference between two identical phrases, right?

16 MR. SURI: No, there's not --

17 CHIEF JUSTICE ROBERTS: The one -- the
18 one "resolved its liability to the United
19 States" under (2) and "resolved its liability to
20 the United States" under (3)(B)?

21 MR. SURI: No, they're not identical
22 phrases. (f)(2) is just "resolved its liability
23 to the United States", and (f)(3)(B) is
24 "resolved its liability to the United States for
25 some or all of a response action." That's the

1 first difference I wanted to focus on, which is
2 that phrase "for some or all of a response
3 action" tells us what the nature of the
4 liability must be in (f)(3)(B).

5 (f)(2), however, is simply silent
6 about the nature of the liability. It contains
7 a gap, and, therefore, it's justified to look at
8 the context to fill the gap.

9 The second point is that it's almost
10 -- there's an absurdity argument rather than a
11 textual argument in (f)(2) because it seems
12 unthinkable that "resolved its liability" means
13 any liability whatsoever under the sun. There's
14 no such concern in (f)(3)(B).

15 CHIEF JUSTICE ROBERTS: Well, in
16 (f)(3)(B), it doesn't -- I mean, it has the
17 language that you mentioned and (f)(2) doesn't
18 because we're not talking about response actions
19 under (2), right, although (3)(B) is talking
20 about response actions?

21 MR. SURI: I agree, Mr. Chief Justice.
22 What that proves is that the presumption that
23 the disparate inclusion and omission of language
24 suggests a difference in meaning is not
25 absolute. It can be overcome by competing

1 indications in the opposite direction. And we
2 do think there are competing indications in
3 (f)(2), but there aren't in (f)(3)(B).

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 Counsel, I'm -- I admit to being
10 somewhat confused by this, primarily because of
11 the earlier Clean Water Act settlement.

12 Do you think that you could have a
13 CERCLA recovery for, say, penalties under other
14 environmental provisions?

15 MR. SURI: No, Justice Thomas. The
16 CERCLA recovery would only be for response costs
17 or response actions, not for penalties under
18 other statutes.

19 JUSTICE THOMAS: Well, could you have
20 brought a CERCLA action against Guam after the
21 2004 settlement?

22 MR. SURI: We do not believe that the
23 settlement here would have allowed us to bring
24 such an action against Guam. And I could walk
25 you through the relevant provisions if you'd

1 like. They're on --

2 JUSTICE THOMAS: Yeah, I would.

3 MR. SURI: They're on page 166a of the
4 Petition Appendix, paragraphs 45, 46, and 48.
5 Paragraph 45 says that the settlement settled
6 the claims in the decree. And under the
7 background law of preclusion and judgments, two
8 claims are considered the same if they arise out
9 of the same transaction or occurrence, even if
10 they involve different statutes.

11 This is confirmed by paragraph 46,
12 which says that the decree should not be
13 interpreted to limit the United States' right to
14 bring claims involving unrelated violations.
15 That necessarily implies that the decree does
16 limit the United States' right to bring claims
17 for related violations.

18 There's also Justice Breyer's point
19 that he raised in a question, which is the
20 decree simply wouldn't make any sense if Guam
21 didn't get anything out of it. Now they're
22 relying on paragraph 48, but the first words of
23 paragraph 48 are "except as specifically
24 provided herein." And as I've just explained,
25 the decree does specifically provide herein for

1 the elimination of the United States' right to
2 bring related claims.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: Well, the trouble I'm
7 having on your side is I can't get too far using
8 the language of the statute. I mean, sure, you
9 could read it your way, "response action" refers
10 to any action, state or federal, brought under
11 any statute dealing with a response action,
12 which is defined in 23, 24. It could mean that,
13 but it could also mean CERCLA actions, okay? It
14 could mean either.

15 And if I look at the definition of
16 "response," it starts by saying "for purposes of
17 this subchapter." Then I look at the definition
18 of "response" and it's about 450 to 500 words,
19 including all kinds of things -- I'm tempted to
20 say anything under the sun, that isn't quite
21 true -- but all kinds of technical things,
22 perimeter protection using dikes, you know,
23 collection of leachate. How do I know whether a
24 state has a collection of leachate law that has
25 nothing really to do with CERCLA?

1 And I don't know. But there could be
2 a lot of lawyers who don't know. And when they
3 go into any one of what could be thousands of
4 cases that involve some of these 450 or 500
5 words under some law of a state or other federal
6 law, do they know they have only three years to
7 ask for contribution?

8 I mean, this is a pretty tough
9 reading, and a lot of people just won't know
10 they have only three years. They might think
11 they had seven or something else. So what kind
12 of a boundary is this if we read it your way?

13 I mean, what statutes are involved?
14 Have you looked up all the statutes in the
15 states that might use words like any of the 450
16 or 500 that are there in the definition? You
17 see the thrust of my question?

18 MR. SURI: Yes, Justice Breyer. Let
19 me provide some reassurance that our position
20 doesn't lead to the kinds of practical problems
21 that you're worried about.

22 The first point is that while
23 "response action" is, indeed, a broad term, it
24 is not an unlimited term. The Court made that
25 point just last term in the Atlantic Richfield

1 opinion when it said not everything under the
2 sun qualifies as a response action.

3 The second answer is that a lot of
4 these cases involve sophisticated parties:
5 Governmental entities, territorial or state
6 governments, and large corporations. These are
7 the kinds of entities that can be expected to
8 have good legal advice about how environmental
9 laws interact with CERCLA.

10 Finally, to the extent that there are
11 case-by-case fairness problems, those should be
12 addressed under a framework such as equitable
13 tolling, not by distorting the meaning of the
14 substantive statute itself.

15 JUSTICE BREYER: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: Counsel, Guam's
18 argument in very simple terms is basically this:
19 We're a small island, and the only reason -- and
20 while we may have contributed to part of the
21 problem with this dump, the Navy contributed
22 quite a bit too, but, in any event, all of this,
23 the respective liability of Guam and the United
24 States should be adjudicated under CERCLA, where
25 the United States could bear some of the costs,

1 but the United States has cleverly proceeded
2 against us under the Clean Water Act for the
3 purpose of avoiding that.

4 Do you have an answer to that?

5 MR. SURI: Yes, Justice Alito.

6 The first answer is that, although
7 Guam gets a lot of mileage out of its
8 allegations that the Navy contributed to the
9 Ordot Dump, and although we're required to
10 accept those allegations as true at this motion
11 to dismiss stage, we don't actually think the
12 allegations are true as a matter of fact.

13 Secondly, EPA had legitimate reasons
14 in 1988 for deciding not to proceed under
15 CERCLA. By that time, the Clean Water Act
16 process had already been underway for a couple
17 of years, and EPA explained how the Clean Water
18 Act procedure would, as it were, kill two birds
19 with one stone. It would solve both the CERCLA
20 problem and the Clean Water Act problem, making
21 CERCLA remedy unnecessary.

22 Now Guam says that it should be
23 allowed to recover under CERCLA, and we agree
24 with that. We just think the recovery should be
25 under the contribution provision rather than the

1 cost recovery provision.

2 And if you step back and think about
3 it, Guam's action, as it were, sounds in
4 contribution. They said that they have been
5 forced to bear an inequitable share of the cost
6 and the United States should bear a portion of
7 that responsibility. That fits to a tee what a
8 contribution action is meant to be about.

9 Now --

10 JUSTICE ALITO: Let me -- let me come
11 back to the -- the subsection 2 argument.
12 Doesn't the -- the way that's worded show that
13 all of these provisions are meant to operate
14 together? Doesn't that substantiate Mr. Garre's
15 anchoring provision argument?

16 Clearly -- and -- and you -- I guess
17 you concede this -- (f)(2) doesn't refer to
18 liability to the United States for -- by anybody
19 for anything. It has to do, presumably, with
20 liability under CERCLA 9607(a), right?

21 MR. SURI: I agree that these
22 provisions are meant to work together. That
23 doesn't override the fact, however, that the two
24 provisions at issue here, (f)(1) and (f)(3),
25 have different language. One says under Section

1 106 or 107, and the other doesn't. And the
2 Court should give effect to that difference in
3 language.

4 JUSTICE ALITO: Well, your -- your
5 argument is that, if subsection 3 didn't refer
6 to response costs, to a response action, it
7 would be read like 2. But, by putting that in,
8 that was a signal that Congress wanted to pick
9 up liability under the Clear Water Act -- Clean
10 Water Act, right?

11 MR. SURI: It's a signal that Congress
12 wanted to pick up liability for response costs
13 or response actions without regard to the
14 statute under which that arose.

15 That makes sense because Congress is
16 trying to encourage settlement. It makes sense
17 that Congress would provide a broader
18 contribution right for settling parties than for
19 non-settling parties.

20 JUSTICE ALITO: All right. Thank you.
21 Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel, I believe
25 I'm right, because I've been told this in the

1 briefing, that the word "responsive action" is
2 not used in any other statute, am I correct --

3 MR. SURI: No.

4 JUSTICE SOTOMAYOR: -- besides CERCLA?

5 MR. SURI: No, that's not quite
6 correct. There are state statutes, baby
7 CERCLAs, as they're sometimes called, that copy
8 the term "response action." But our --

9 JUSTICE SOTOMAYOR: They copy it in
10 their own statutes?

11 MR. SURI: Correct. But our position
12 --

13 JUSTICE SOTOMAYOR: All right. Now,
14 counsel, you know, one could be prompted to bid
15 -- build a lid for a dump in response to CERCLA
16 or one might do so in response to a nuisance
17 claim in state court. Both would be response
18 actions.

19 Why shouldn't it matter why a person
20 initiates an activity? It -- it seems to me,
21 just for the reasons Justice Alito just said,
22 the simplest reason, if "response action" is
23 CERCLA-specific in terms of all of the
24 activities that it can be, why should we build
25 that into a different act, like the Clean Water

1 Act?

2 By the way, I thought that the harm
3 addressed in the Clean Water Act was releasing
4 pollutants without a permit. That's a very
5 different harm than what CERCLA looks to, which
6 is releasing hazardous pollutants, with or
7 without a permit, you're still prohibited from
8 doing that.

9 So those -- aren't those two different
10 harms, and why should one extinguish or create
11 an obligation to claim under another?

12 MR. SURI: To take the first question
13 first, the best answer is the list of provisions
14 we've provided at pages 13 to 14 of our brief.
15 These are provisions that show that CERCLA uses
16 the word "response" to refer to actions taken
17 under other statutes, including the Clean Water
18 Act itself. This is on page 14, Section
19 9604(k)(12).

20 Now, as for your question about the
21 harms, we don't agree with the characterization
22 that these harms are fundamentally different.
23 EPA itself determined when deciding not to
24 proceed under the -- under CERCLA that the Clean
25 Water Act remedy would address both the CERCLA

1 harm and the Clean Water Act harm.

2 JUSTICE SOTOMAYOR: But the release
3 didn't say that?

4 MR. SURI: I -- I agree. But the
5 question is --

6 JUSTICE SOTOMAYOR: And you could have
7 done that just as easily, correct?

8 MR. SURI: Certainly. But that's not
9 what the statute requires.

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Suri, I just
14 wanted to make sure I understood your answer to
15 the Chief Justice about the meaning of (f)(2).

16 If I understood you right, you
17 acknowledge that there was a gap in (f)(2), in
18 other words, liability for what. And you said
19 that the way that gap should be filled is to say
20 liability for a response action. Is that right?

21 MR. SURI: That's correct, Justice
22 Kagan.

23 JUSTICE KAGAN: So you're essentially
24 making (f)(2) the same as (f)(3)(B), is that
25 right?

1 MR. SURI: That's correct. And we
2 think one contextual justification for that is
3 (f)(3)(B) itself includes a reference back to
4 (f)(2).

5 JUSTICE KAGAN: And -- and -- and, Mr.
6 Suri, I mean, I -- I asked Mr. Garre about this,
7 and Mr. Garre says that your litigating position
8 up until now has been the opposite, that (f)(2)
9 was more like (f)(1), that it's CERCLA
10 liability.

11 MR. SURI: No, I think the truth of
12 the matter is that we have not said anything
13 about (f)(2) until this point. We certainly
14 haven't conceded that (f)(2) is like (f)(1).

15 JUSTICE KAGAN: Okay. So, if you're
16 saying (f)(2) and (f)(3)(B) go hand in hand and
17 they're different from (f)(1), I guess the
18 question that follows is, why? What's the
19 theory on which in (f)(2) and (f)(3)(B) Congress
20 broadened out liability?

21 MR. SURI: Why did Congress treat
22 (f)(2) and (f)(3)(B) differently than (f)(1)?
23 Is that the question?

24 JUSTICE KAGAN: That's the question.

25 MR. SURI: All right. The reason -- I

1 can think of a few plausible reasons, although I
2 don't know which one is true as a matter of
3 fact.

4 The first is that Congress meant to
5 encourage settlements and, therefore, provided
6 broader rights with respect to settlements than
7 with respect to non-settling parties.

8 JUSTICE KAGAN: So, when I suggested
9 that to Mr. Garre, Mr. Garre told me I was
10 wrong, that it would discourage settlements if
11 you read it your way because everybody would be
12 completely uncertain about what they were liable
13 for, so then they would never settle.

14 MR. SURI: No, I think that Congress
15 clearly was providing a benefit in (f)(2) and
16 (f)(3)(B). It was granting parties more rights,
17 like protection from contribution claims and the
18 ability to bring additional contribution claims.

19 Now it's true that, in the particular
20 circumstances of this case, that may have turned
21 out to be more than a -- more a curse than a
22 blessing, but that's because of the particular
23 factual circumstances of this case. That's not
24 necessarily true as a general matter.

25 JUSTICE KAGAN: I -- I interrupted you

1 before. You were saying there were some other
2 theories about why (f)(2) and (f)(3) would be
3 different from (f)(1)?

4 MR. SURI: Yeah, there are two more.
5 The second is that, when you have a court
6 judgment, it's easy to determine which section a
7 particular claim arose under. But, in the
8 context of a settlement, that might not be
9 something the settlement explicitly discusses.
10 It might just say here are the actions that the
11 party is required to take. It might be
12 administratively easier, therefore, to focus the
13 contribution inquiry on that rather than the
14 section under which it arose.

15 And the final reason is that (f)(1)
16 was written by the House Energy and Commerce
17 Committee and (f)(3)(B) was written by the House
18 Judiciary Committee. They may have simply had
19 different ideas about how this provision should
20 operate.

21 JUSTICE KAGAN: Thank you, Mr. Suri.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch.

24 JUSTICE GORSUCH: Good morning. I'd
25 like to ask you a question about preemption. As

1 I understand the government's argument, (3)(B),
2 reads (3)(B) as liability for response action to
3 include settlements with states under state law,
4 and then (3)(C), you read any -- all those
5 settlements now have to be governed by federal
6 law and, just like that, pretty much every state
7 contribution regime is preempted.

8 We have a brief from, I think, about
9 25, 26 states and territories, including some
10 very different ones, everything from --
11 everybody from Massachusetts to Wyoming, saying
12 that that would seriously impair state cleanup
13 efforts to federalize and preempt every -- every
14 -- every -- every settlement, if you can read
15 "response action" quite so broadly, and that
16 this is going to wind up impairing cleanup
17 efforts rather than advancing them.

18 What -- what -- what do you -- what --
19 what's your thoughts about that?

20 MR. SURI: Justice Gorsuch, the
21 premise that our petition had that preemptive
22 effect is incorrect, and there are two
23 provisions of the statute that show that it's
24 incorrect.

25 The first is the last sentence of

1 (f)(1) and the second is the last sentence of
2 (f)(3)(C). So the last sentence of (f)(1) says
3 nothing in this section -- that's the whole
4 subsection, not just (f)(1), shall diminish the
5 right of any person to bring an action for
6 contribution.

7 JUSTICE GORSUCH: Oh, no, sure, I -- I
8 know we have all these savings clauses
9 everywhere. They're all through CERCLA, but --
10 but as I understand your reading of -- of (B)
11 and (C) under (3), you read (B) to be very broad
12 and -- and (C) to then say they have to be
13 governed by federal law. So maybe you could
14 turn your attention there if you have some
15 answer to that problem.

16 MR. SURI: Certainly do. Any
17 contribution action brought under this paragraph
18 shall be governed by federal law, is what (C)
19 says, not any contribution action concerning
20 this subject matter.

21 So, of course, if a contribution
22 action is brought under this paragraph, it's
23 governed by federal law, but --

24 JUSTICE GORSUCH: But you -- again,
25 you've read the paragraph, which includes (B), I

1 think you mean include (B), very, very broadly.
2 So I mean we're just bouncing through the
3 statute. And I'm not getting to the core of the
4 problem.

5 MR. SURI: No, Justice Gorsuch. Our
6 point is simply if a party wants to bring a
7 state law action under state law, he can do that
8 and it's governed by state law. If he wants to
9 bring it under this paragraph, it's governed by
10 federal law. There's no preemption there
11 because they're both avenues that are open to
12 those parties.

13 Now, it's true a party could choose to
14 bring a federal contribution claim with respect
15 to a state law liability under our
16 interpretation, but that doesn't preempt the
17 state. That just means there are two options
18 open to the settling party.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Thank you, Chief
23 Justice. Good afternoon, Mr. Suri.

24 MR. SURI: Good afternoon.

25 JUSTICE KAVANAUGH: I think you said

1 earlier that if Congress wanted to limit
2 113(f)(3)(B) to CERCLA, it could have said so.
3 And, obviously, as is often the case, you could
4 flip that question around and say if they wanted
5 to -- if Congress wanted to usher in your
6 position, they could have said so. So I'm
7 thinking about that framing of what's more
8 likely here.

9 What do you make of your opposing
10 counsel's suggestion that you're cutting off a
11 right to sue here, that there's a lack of fair
12 notice, trap for the unwary? And I think that
13 picks up also on some of Justice Breyer's
14 questions. In other words, in thinking about
15 how to think about what you're characterizing as
16 silence here, let's just assume for the second
17 that it -- that it is. We should think about
18 that consideration and how to interpret that
19 here?

20 MR. SURI: Justice Kavanaugh, there
21 won't be a trap for the unwary going forward
22 because the rule established by this Court will
23 apply across the country and everyone will know
24 what they have to do.

25 JUSTICE KAVANAUGH: Do you agree that

1 it could be a trap for the unwary, though,
2 having -- looking backwards?

3 MR. SURI: I agree that's a potential
4 problem, but that's always the case with any
5 case of statutory interpretation. You have
6 uncertainty about what the statute means before
7 a court comes in and resolves the uncertainty.
8 That's no reason to adopt what we think is the
9 less textually plausible argument.

10 If I could say one more word, however,
11 contesting your premise of --

12 JUSTICE KAVANAUGH: Sure.

13 MR. SURI: -- statutory silence, if a
14 provision is silent, the normal rule to is to
15 apply it according to its terms and not to infer
16 an unstated limitation. So if you think the
17 textual arguments are in equipoise, you should
18 go with what the most natural reading of the
19 term response action is, and that doesn't
20 include any qualifiers such as "under CERCLA."

21 JUSTICE KAVANAUGH: Thank you, Mr.
22 Suri.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett.

25 JUSTICE BARRETT: I have no questions.

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, Mr. Suri.

3 MR. SURI: I have nothing further, Mr.
4 Chief Justice. Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
6 Garre?

7 REBUTTAL ARGUMENT OF GREGORY G. GARRE
8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Mr. Chief
10 Justice.

11 With respect to (f)(2), this is a
12 brand-new argument, as counsel acknowledged
13 today. We argued in our brief that (f)(2) had
14 to be interpreted to mean resolve CERCLA
15 liability. The government was silent on that in
16 its brief, and with respect, I'm not sure it
17 should be able to introduce new arguments at
18 oral argument.

19 Having said that, its position is
20 telling. It's asking this Court now to copy and
21 paste words from (f)(B) -- (f)(3)(B) into
22 (f)(2), which only makes the problem worse.

23 The key term is "resolved its
24 liability." Is it CERCLA liability or is it
25 liability under any other law? Of course, it's

1 CERCLA liability in (f)(2), and my friend wanted
2 to devolve into the statutory history here. If
3 you want to go there, as we say on page 30 of
4 our brief, the legislative history makes clear
5 that Congress had in mind CERCLA liability.

6 Secondly, the consent decree
7 explicitly reserves the United States' right to
8 bring any claim under any law, including a
9 CERCLA claim. And my friend skipped over
10 paragraph 47 of the decree that explicitly says
11 that.

12 I couldn't agree more with Justice
13 Sotomayor that the harm addressed by the Clean
14 Water Act, the discharge of pollutants into the
15 water in violation of a permit, is very
16 different than the harm alleged by CERCLA --
17 dealt with by CERCLA, which is hazardous
18 substances in the ground, which itself is
19 significant under common law contribution
20 principles.

21 The bottom line is that the United
22 States wants to have its cake and eat it too.
23 It sued Guam under the Clean Water Act in order
24 to insulate itself from liability for its own
25 role at the Ordot Dump, allegations that must be

1 accepted as true, and now it wants to block
2 Guam's actions to recover a portion of its
3 cleanup costs by saying that the parties'
4 settlement -- the Clean Water Act claims somehow
5 barred a CERCLA contribution claim. There's no
6 basis in CERCLA, the common law of contribution,
7 or anything else the government relied upon in
8 its brief or today at oral argument to allow the
9 United States to get away with that ploy here.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 The case is submitted.

14 (Whereupon, at 12:40 p.m., the case
15 was submitted.)

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Official - Subject to Final Review

<p>1</p> <p>1 [2] 13:15 14:23 106 [4] 13:6 20:25 28:14 43:1 107 [6] 5:12 13:7 20:25 23:17 28:14 43:1 107(a) [2] 6:1 10:3 11:47 [2] 1:16 3:2 113 [1] 5:10 113(3) [1] 5:24 113(3)(B) [1] 24:4 113(3)(C) [1] 24:18 113(f) [6] 4:15 6:21 8:6 21:6 23:7 31:22 113(f)(1) [2] 13:3,4 113(f)(3) [1] 13:3 113(f)(3)(B) [12] 3:22,25 4:11 5:19 6:15 13:12 16:10 28:12 31:14,23 32:20 53:2 12:40 [1] 57:14 13 [1] 45:14 13(b)(f)(B) [1] 30:13 14 [2] 45:14,18 166a [1] 37:3 1988 [1] 41:14</p>	<p>A</p> <p>a.m [2] 1:16 3:2 ability [3] 28:14,16 48:18 able [1] 55:17 abnormal [1] 7:7 above-entitled [1] 1:14 absolute [1] 35:25 absolutely [2] 17:14 24:9 absurdity [1] 35:10 accept [1] 41:10 accepted [1] 57:1 according [1] 54:15 acknowledge [2] 34:6 46:17 acknowledged [1] 55:12 across [2] 24:25 53:23 Act [43] 3:14,18 4:24 5:17 8:2,11,19 9:20,24 10:6,15 12:1 16:16,24 19:10,15 24:1 27:10 29:14,16 30:21 31:1,5 33:10,11,11,12 36:11 41:2,15,18,20 43:9,10 44:25 45:1,3,18,25 46:1 56:14,23 57:4 action [54] 4:25 5:2 12:4,6,19 13:5,6,10,15 14:19 20:14,24 24:19 28:13,17,17,18 30:11,16,17,24 31:7 32:25,25 33:2,5,12,19 34:5,9,25 35:3 36:20,24 38:9,10,11 39:23 40:2 42:3,8 43:6 44:1,8,22 46:20 50:2,15 51:5,17,19,22 52:7 54:19 actions [17] 10:21 11:13 14:20 15:17 19:4 28:11 29:10,12 35:18,20 36:17 38:13 43:13 44:18 45:16 49:10 57:2 activities [1] 44:24 activity [1] 44:20 acts [1] 33:5 actually [3] 20:25 28:24 41:11 add [3] 12:3 13:12,24 addition [1] 33:4 additional [1] 48:18 address [1] 45:25 addressed [6] 13:11 15:7 21:18 40:12 45:3 56:13 adjudicated [1] 40:24 administrative [3] 14:1,7 28:21 administratively [1] 49:12 admission [1] 10:16 admit [4] 10:19 11:1 16:14 36:9 adopt [2] 6:11 54:8 adopted [5] 8:6 9:11 25:1,7 27:2 adopting [1] 31:17 advancing [1] 50:17 advice [1] 40:8 afternoon [4] 26:25 28:8</p>	<p>52:23,24 agree [12] 10:20 13:19 18:15,19 35:21 41:23 42:21 45:21 46:4 53:25 54:3 56:12 agreed [1] 19:1 agreement [2] 11:24 17:17 agreements [3] 16:11,13 32:6 agrees [1] 5:23 Alito [11] 12:25 13:1 14:16 15:23 40:16,17 41:5 42:10 43:4,20 44:21 Alito's [1] 24:17 allegations [4] 41:8,10,12 56:25 alleged [1] 56:16 allow [1] 57:8 allowed [2] 36:23 41:23 almost [1] 35:9 alone [1] 12:20 already [2] 13:13 41:16 alternative [1] 24:25 although [4] 35:19 41:6,9 48:1 altogether [1] 12:11 amici [2] 15:7 25:3 among [2] 29:3 31:25 amount [1] 28:19 analysis [1] 6:10 anchor [1] 6:4 anchoring [2] 20:3 42:15 anomalies [1] 9:14 anomaly [1] 10:8 another [5] 20:8 27:15 30:20 31:4 45:11 answer [6] 40:3 41:4,6 45:13 46:14 51:15 anybody [1] 42:18 anytime [1] 15:9 appeal [1] 23:23 APPEARANCES [1] 1:18 Appendix [1] 37:4 applies [1] 7:7 apply [3] 9:22 53:23 54:15 approve [1] 13:21 approved [3] 13:13 14:9 28:21 April [1] 1:12 aren't [4] 8:7 13:13 36:3 45:9 argued [1] 55:13 argument [28] 1:15 2:2,5,8 3:4,7 11:1,4 13:25 18:2,14 19:11 20:3,15 24:12 32:16 35:10,11 40:18 42:11,15 43:5 50:1 54:9 55:7,12,18 57:8 arguments [3] 18:1 54:17 55:17 arise [2] 8:14 37:8 arisen [1] 9:5 arising [1] 17:22 arose [4] 32:22 43:14 49:7,</p>	<p>14 around [2] 7:20 53:4 art [2] 6:8 30:12 articulate [1] 6:2 asks [1] 16:5 asserted [1] 7:8 Assistant [1] 1:21 assume [2] 25:12 53:16 Atlantic [1] 39:25 attention [1] 51:14 atypical [2] 11:14 12:13 authority [2] 6:9 29:8 autonomy [1] 25:5 avenues [1] 52:11 avoid [3] 3:20 27:13 28:1 avoiding [1] 41:3 away [3] 3:13 17:10 57:9</p>	<p>briefing [1] 44:1 bring [16] 8:10 10:5 11:16,19 18:22 24:1 36:23 37:14,16 38:2 48:18 51:5 52:6,9,14 56:8 bringing [3] 5:11 9:24 10:2 broad [6] 21:25 22:20 29:24 30:6 39:23 51:11 broadened [1] 47:20 broader [3] 22:21 43:17 48:6 broadly [2] 50:15 52:1 brought [9] 8:19 9:2 14:19 15:17 24:19 36:20 38:10 51:17,22 build [2] 44:15,24 building [1] 3:16</p> <p>B</p> <p>baby [1] 44:6 back [7] 12:7 24:17 25:18 31:16 42:2,11 47:3 backdrop [1] 22:10 background [1] 37:7 backwards [1] 54:2 barred [1] 57:5 Barrett [8] 28:7,8 29:6,19 30:6 31:8 54:24,25 basic [1] 8:4 basically [1] 40:18 basis [1] 57:6 bear [3] 40:25 42:5,6 begins [1] 33:24 behalf [8] 1:20,22 2:4,7,10 3:8 32:17 55:8 believe [3] 26:14 36:22 43:24 belts-and-suspender [1] 14:12 benefit [1] 48:15 besides [1] 44:4 best [2] 6:9 45:13 Bethesda [1] 1:19 better [2] 25:9 32:10 between [2] 13:3 34:15 beyond [1] 8:8 bid [1] 44:14 birds [1] 41:18 bit [2] 14:11 40:22 blessing [1] 48:22 block [1] 57:1 both [4] 41:19 44:17 45:25 52:11 bottom [1] 56:21 bouncing [1] 52:2 boundary [1] 39:12 brand-new [1] 55:12 Breyer [12] 10:11,12,25 11:4,16,19,23 12:23 38:5,6 39:18 40:15 Breyer's [3] 16:3 37:18 53:13 brief [7] 25:3 45:14 50:8 55:13,16 56:4 57:8</p> <p>C</p> <p>cake [1] 56:22 call [1] 6:4 called [1] 44:7 came [1] 1:14 cap [1] 12:6 cardinal [1] 6:13 carry [1] 14:23 Case [18] 3:4 5:11 14:6,9 18:1 24:7 27:2,7 29:9 32:4,8 48:20,23 53:3 54:4,5 57:13,14 case-by-case [1] 40:11 cases [4] 9:5 10:18 39:4 40:4 centers [1] 6:4 CERC [1] 3:19 CERCLA [102] 3:13,19,22,23,24 4:1,3,7,7 5:4,10,21 6:16,23 7:3 8:9,11,17,22 9:2,8,8,23,25 10:3 11:17,20,20 12:8 13:5 14:14 15:3 16:9 19:17 20:20,22 21:4,9,12,16,24 22:6,18 23:1,5 24:22 25:7,12 26:1,8,9,18 27:11 28:2,3,11 29:3,12,23 30:2,4,12,24 31:3,7 32:11,22 33:1,4,7 34:2 36:13,16,20 38:13,25 40:9,24 41:15,19,21,23 42:20 44:4,15 45:5,15,24,25 47:9 51:9 53:2 54:20 55:14,24 56:1,5,9,16,17 57:5,6 CERCLA's [1] 31:18 CERCLA-contained [1] 31:19 CERCLA-specific [3] 20:23 29:21 44:23 CERCLAs [1] 44:7 certain [1] 31:22 certainly [6] 7:23 8:13,16 46:8 47:13 51:16 changes [1] 4:14 characterization [1] 45:21 characterizing [1] 53:15</p>
---	--	--	---	--

Official - Subject to Final Review

<p>CHIEF ^[39] 3:3,9 5:6 6:2 7:13,15 10:10 12:25 15:24 20:1 23:13 26:21,23 28:6 31:10 32:13,18 33:22 34:4,13,17 35:15,21 36:4,7 38:4 40:16 43:22 46:12,15 49:22 52:20,22 54:23 55:1,4,5,9 57:11</p> <p>choose ^[1] 52:13</p> <p>circuit ^[2] 9:11 20:19</p> <p>circuits ^[1] 9:5</p> <p>circumstances ^[3] 29:17 48:20,23</p> <p>civil ^[2] 13:6,14</p> <p>claim ^[42] 3:19,19,24 4:7,19 7:24 8:4,11,17,19,22 9:8,24 10:3,5 11:1,20,20 12:19 15:3,4,9,11 16:9 18:22 22:1 24:2,21 25:19,22 26:1,8 27:7 32:21,22 44:17 45:11 49:7 52:14 56:8,9 57:5</p> <p>claims ^[21] 3:17 9:1 11:12 16:15,24 17:3,4,6,21 19:3 23:1 31:5 32:1 37:6,8,14,16 38:2 48:17,18 57:4</p> <p>clause ^[2] 11:3,5</p> <p>clauses ^[1] 51:8</p> <p>Clean ^[36] 3:14,17 4:23 5:17 8:2,10,19 9:19,19,24 10:6 12:1 16:15,24 19:10,15 24:1 27:10 29:14 30:21 31:1,5 36:11 41:2,15,17,20 43:9 44:25 45:3,17,24 46:1 56:13,23 57:4</p> <p>cleanup ^[5] 3:12 32:5 50:12,16 57:3</p> <p>clear ^[6] 13:8 23:16 24:8 27:14 43:9 56:4</p> <p>clearly ^[4] 25:4 29:15 42:16 48:15</p> <p>cleverly ^[1] 41:1</p> <p>close ^[1] 20:8</p> <p>colleague ^[1] 16:3</p> <p>collection ^[2] 38:23,24</p> <p>come ^[2] 12:7 42:10</p> <p>comes ^[3] 9:19 28:10 54:7</p> <p>Commerce ^[1] 49:16</p> <p>Committee ^[2] 49:17,18</p> <p>common ^[14] 4:6,6,17 22:10 23:3,4,4,7 25:21 26:18 27:20,21 56:19 57:6</p> <p>comparable ^[1] 17:20</p> <p>compels ^[1] 31:15</p> <p>competing ^[2] 35:25 36:2</p> <p>complaint ^[1] 17:22</p> <p>completely ^[1] 48:12</p> <p>compliance ^[1] 17:6</p> <p>comply ^[1] 33:3</p> <p>concede ^[1] 42:17</p> <p>conceded ^[1] 47:14</p> <p>concern ^[1] 35:14</p> <p>concerning ^[1] 51:19</p> <p>conclusion ^[2] 15:19 23:9</p>	<p>conditioned ^[1] 17:6</p> <p>conditions ^[1] 12:16</p> <p>conduct ^[2] 11:13 19:4</p> <p>confirmed ^[1] 37:11</p> <p>confused ^[1] 36:10</p> <p>confusion ^[1] 16:4</p> <p>Congress ^[27] 8:6 13:22 14:5,13,22 15:14,16,20 21:8 23:9 24:18 25:6 26:5,14 27:14 33:6 43:8,11,15,17 47:19,21 48:4,14 53:1,5 56:5</p> <p>connection ^[1] 30:18</p> <p>consent ^[2] 12:14 56:6</p> <p>consequences ^[2] 25:10,11</p> <p>consider ^[1] 17:16</p> <p>consideration ^[1] 53:18</p> <p>considered ^[2] 20:6 37:8</p> <p>consistent ^[2] 7:6 8:20</p> <p>construe ^[1] 7:10</p> <p>construed ^[3] 6:14 23:2,7</p> <p>construing ^[2] 4:10 28:1</p> <p>contained ^[2] 8:10 9:23</p> <p>contains ^[1] 35:6</p> <p>contesting ^[1] 54:11</p> <p>context ^[7] 4:1,12 6:14 7:6 31:14 35:8 49:8</p> <p>contextual ^[1] 47:2</p> <p>contrary ^[3] 4:9 9:11 27:16</p> <p>contributed ^[3] 40:20,21 41:8</p> <p>contribution ^[65] 3:19,24 4:1,4,7,16 5:18 6:16 7:24 8:4,5,21,23 9:3,18,25 10:5 13:4,10 14:19 15:3,11,17,20 16:9 22:3,10 23:3 24:14,19,24 25:7,19,22 26:1,4,6,9,10,16 27:11,20,23 28:2 29:5 31:15,19 32:21 39:7 41:25 42:4,8 43:18 48:17,18 49:13 50:7 51:6,17,19,21 52:14 56:19 57:5,6</p> <p>contributions ^[1] 19:13</p> <p>Conversely ^[1] 32:2</p> <p>copy ^[3] 44:7,9 55:20</p> <p>core ^[1] 52:3</p> <p>corporations ^[1] 40:6</p> <p>correct ^[11] 16:17,24 17:4,12 19:12 44:2,6,11 46:7,21 47:1</p> <p>cost ^[11] 10:2 15:12 25:1 26:3 27:17 28:17 30:2,3 31:24 42:1,5</p> <p>costs ^[17] 6:1 20:24 28:20,24,24 29:22 30:7,8,11,16,17,23 36:16 40:25 43:6,12 57:3</p> <p>couldn't ^[2] 8:12 56:12</p> <p>counsel ^[14] 17:3,8 18:13 19:23 32:14 33:22 36:5,9 40:17 43:24 44:14 46:11 55:12 57:12</p> <p>counsel's ^[1] 53:10</p>	<p>country ^[2] 25:1 53:23</p> <p>couple ^[1] 41:16</p> <p>course ^[2] 51:21 55:25</p> <p>COURT ^[19] 1:1,15 3:10 8:5 13:20 14:13 15:13 23:6,16 28:1,22 32:19 39:24 43:2 44:17 49:5 53:22 54:7 55:20</p> <p>Court's ^[2] 5:5 33:21</p> <p>covenant ^[3] 12:15 18:10,20</p> <p>covered ^[3] 13:14 14:2 30:3</p> <p>covers ^[2] 13:17 14:1</p> <p>create ^[3] 21:25 26:6 45:10</p> <p>created ^[2] 15:22 16:3</p> <p>creates ^[5] 4:12 9:14 10:8 27:19 29:17</p> <p>critical ^[1] 30:15</p> <p>curse ^[1] 48:21</p> <p>cutting ^[1] 53:10</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:11,22 20:19</p> <p>damages ^[1] 17:10</p> <p>day ^[1] 12:8</p> <p>deal ^[4] 22:8 25:1 26:3 34:8</p> <p>dealing ^[1] 38:11</p> <p>dealt ^[1] 56:17</p> <p>deciding ^[3] 28:23 41:14 45:23</p> <p>decision ^[1] 3:12</p> <p>decree ^[12] 5:1,3 12:14 17:7 19:5 37:6,12,15,20,25 56:6,10</p> <p>defeats ^[1] 18:23</p> <p>defendant ^[1] 4:18</p> <p>defined ^[6] 6:7 28:13 29:22 31:7 33:1 38:12</p> <p>definition ^[5] 30:7,23 38:15,17 39:16</p> <p>Department ^[1] 1:22</p> <p>depend ^[1] 33:1</p> <p>depends ^[2] 4:10 5:19</p> <p>designed ^[1] 22:18</p> <p>details ^[1] 14:23</p> <p>determination ^[1] 16:7</p> <p>determine ^[1] 49:6</p> <p>determined ^[2] 28:19 45:23</p> <p>devolve ^[1] 56:2</p> <p>difference ^[4] 34:15 35:1,24 43:2</p> <p>different ^[22] 7:4 9:16 15:12 18:3 20:9,12,16 27:8,24 29:25 31:1 37:10 42:25 44:25 45:5,9,22 47:17 49:3,19 50:10 56:16</p> <p>differently ^[2] 22:17 47:22</p> <p>difficult ^[1] 34:7</p> <p>dikes ^[1] 38:22</p> <p>diminish ^[1] 51:4</p> <p>direct ^[2] 15:13 25:5</p> <p>direction ^[1] 36:1</p>	<p>discharge ^[2] 30:25 56:14</p> <p>disclaim ^[1] 16:12</p> <p>disclaims ^[1] 16:6</p> <p>discourage ^[1] 48:10</p> <p>discrete ^[1] 26:1</p> <p>discusses ^[1] 49:9</p> <p>discussing ^[1] 27:18</p> <p>dismiss ^[1] 41:11</p> <p>disparate ^[1] 35:23</p> <p>displacing ^[1] 27:16</p> <p>dispute ^[2] 7:1 21:7</p> <p>disputed ^[1] 21:23</p> <p>disruptive ^[1] 26:13</p> <p>distorting ^[1] 40:13</p> <p>doing ^[1] 45:8</p> <p>done ^[2] 14:13 46:7</p> <p>doubt ^[1] 3:14</p> <p>drops ^[1] 20:13</p> <p>Dump ^[7] 3:12,16 12:6 40:21 41:9 44:15 56:25</p> <p>during ^[1] 13:6</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[3] 6:24 7:20 22:7</p> <p>earlier ^[2] 36:11 53:1</p> <p>easier ^[1] 49:12</p> <p>easily ^[2] 33:8 46:7</p> <p>easy ^[1] 49:6</p> <p>eat ^[1] 56:22</p> <p>effect ^[3] 24:13 43:2 50:22</p> <p>effectively ^[1] 26:9</p> <p>effort ^[1] 20:4</p> <p>efforts ^[2] 50:13,17</p> <p>either ^[2] 29:2 38:14</p> <p>eliminate ^[1] 31:25</p> <p>elimination ^[1] 38:1</p> <p>elsewhere ^[1] 14:13</p> <p>encompass ^[1] 29:24</p> <p>encourage ^[5] 22:18,22,24 43:16 48:5</p> <p>Energy ^[1] 49:16</p> <p>enjoys ^[1] 27:9</p> <p>ensure ^[2] 31:18,22</p> <p>entities ^[2] 40:5,7</p> <p>entitled ^[2] 5:25 33:23</p> <p>environmental ^[3] 17:19 36:14 40:8</p> <p>EPA ^[5] 29:11 30:9 41:13,17 45:23</p> <p>EPA's ^[1] 32:6</p> <p>epitomized ^[1] 27:6</p> <p>equipoise ^[1] 54:17</p> <p>equitable ^[1] 40:12</p> <p>especially ^[1] 20:8</p> <p>ESQ ^[3] 2:3,6,9</p> <p>ESQUIRE ^[1] 1:19</p> <p>essentially ^[1] 46:23</p> <p>established ^[1] 53:22</p> <p>establishing ^[1] 6:22</p> <p>even ^[3] 4:18 8:8 37:9</p> <p>event ^[1] 40:22</p> <p>Everybody ^[3] 5:23 48:11 50:11</p> <p>everyone ^[1] 53:23</p>	<p>everything ^[2] 40:1 50:10</p> <p>everywhere ^[1] 51:9</p> <p>exactly ^[2] 25:12 33:19</p> <p>except ^[2] 12:15 37:23</p> <p>Excuse ^[1] 11:18</p> <p>expect ^[1] 9:8</p> <p>expected ^[1] 40:7</p> <p>explain ^[2] 24:12 34:8</p> <p>explained ^[2] 37:24 41:17</p> <p>explaining ^[1] 34:14</p> <p>explicit ^[1] 19:5</p> <p>explicitly ^[4] 11:10 49:9 56:7,10</p> <p>exposed ^[3] 5:2 12:18 16:8</p> <p>express ^[1] 10:16</p> <p>expressly ^[1] 16:6</p> <p>extent ^[1] 40:10</p> <p>extinguish ^[2] 11:9 45:10</p> <p>extraordinarily ^[1] 21:25</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>f(1) ^[20] 6:22 14:3 20:10,17,20 21:1,3,20 22:5,17 42:24 47:9,14,17,22 49:3,15 51:1,2,4</p> <p>f(1)(3)(C) ^[1] 14:17</p> <p>f(2) ^[31] 7:2 21:8,16,17,19,25 33:23 34:6,10,22 35:5,11,17 36:3 42:17 46:15,17,24 47:4,8,13,14,16,19,22 48:15 49:2 55:11,13,22 56:1</p> <p>f(3) ^[4] 21:11,19 42:24 49:2</p> <p>f(3)(B) ^[22] 5:25 7:4 20:11,16,21,22 22:17,20 34:11,23 35:4,14,16 36:3 46:24 47:3,16,19,22 48:16 49:17 55:21</p> <p>f(3)(C) ^[2] 14:18 51:2</p> <p>f(B) ^[1] 55:21</p> <p>fact ^[7] 12:5 14:17 15:16 30:7 41:12 42:23 48:3</p> <p>factual ^[1] 48:23</p> <p>fails ^[1] 4:23</p> <p>fair ^[2] 32:5 53:11</p> <p>fairness ^[1] 40:11</p> <p>far ^[2] 32:10 38:7</p> <p>favor ^[1] 32:4</p> <p>fearful ^[1] 17:11</p> <p>federal ^[20] 14:21 15:3,4,10,18 17:19 24:20,23 26:2,11 27:16,17 38:10 39:5 50:5 51:13,18,23 52:10,14</p> <p>federalize ^[1] 50:13</p> <p>few ^[1] 48:1</p> <p>figure ^[1] 29:20</p> <p>filed ^[1] 25:3</p> <p>fill ^[1] 35:8</p> <p>filled ^[1] 46:19</p> <p>final ^[1] 49:15</p> <p>Finally ^[1] 40:10</p> <p>finding ^[3] 11:6 16:19 18:23</p>
--	---	--	---	---

Official - Subject to Final Review

<p>First ^[13] 3:22 9:11 27:5 33:23 34:12 35:1 37:22 39:22 41:6 45:12,13 48:4 50:25 fits ^[2] 6:5 42:7 flip ^[1] 53:4 focus ^[2] 35:1 49:12 following ^[2] 13:6,14 follows ^[3] 8:23 32:23 47:18 forced ^[1] 42:5 formulation ^[1] 20:13 forum ^[1] 29:5 forward ^[2] 23:20 53:21 framework ^[1] 40:12 framing ^[1] 53:7 friend ^[2] 56:1,9 fundamental ^[1] 23:25 fundamentally ^[4] 11:7 16:22 21:3 45:22 further ^[1] 55:3 future ^[3] 10:21 12:16 16:8</p> <hr/> <p>G</p> <p>gap ^[4] 35:7,8 46:17,19 GARRE ^[72] 1:19 2:3,9 3:6,7,9 5:6,16 6:12 7:17,22 8:12 9:4 10:1,24 11:5,18,21,25 13:16 15:1 16:1,18,22,25 17:5,13,16 18:2,7,10,13,15,18 19:14,18,21,25 20:2,18 21:21 22:14,15,23 23:11,12,15,18,24 24:4,9,16 25:14,17 26:25 27:4 28:5,9,25 29:7 30:5,10 31:9,11,12 47:6,7 48:9,9 55:6,7,9 Garre's ^[1] 42:14 gather ^[1] 6:7 General ^[8] 1:21 17:20,24,25 18:7,12,13 48:24 gets ^[3] 24:17 25:18 41:7 getting ^[3] 9:20 29:20 52:3 give ^[6] 25:15 27:1 31:20 32:7,20 43:2 given ^[1] 30:6 gives ^[1] 11:10 giving ^[2] 9:15 26:15 Gorsuch ^[17] 23:14,15,21 24:3,5,11 25:8,15 26:20 27:18 49:23,24 50:20 51:7,24 52:5,19 got ^[3] 10:13 17:9,10 governed ^[8] 14:21 24:20 50:5 51:13,18,23 52:8,9 government ^[8] 7:1,8 21:7,11,22 22:3 55:15 57:7 government's ^[8] 10:4,7 15:8 24:14 25:24 26:7 27:3 50:1 Governmental ^[1] 40:5 governments ^[1] 40:6 granting ^[1] 48:16 great ^[1] 19:8 greatest ^[1] 19:8 GREGORY ^[5] 1:19 2:3,9</p>	<p>3:7 55:7 ground ^[1] 56:18 GUAM ^[15] 1:3 3:4,13,13 5:1 12:17 19:1,3 36:20,24 37:20 40:23 41:7,22 56:23 Guam's ^[10] 4:25 17:18 31:16,17 32:4,9 33:16 40:17 42:3 57:2 guess ^[5] 20:2 25:8 29:19 42:16 47:17 guidelines ^[1] 6:6</p> <hr/> <p>H</p> <p>hand ^[2] 47:16,16 happen ^[1] 29:2 happened ^[1] 16:17 happens ^[4] 13:23 14:6,8 22:8 hard ^[2] 26:14 32:2 harm ^[6] 45:2,5 46:1,1 56:13,16 harms ^[3] 45:10,21,22 haul ^[1] 32:11 hazardous ^[5] 30:18,22 31:2 45:6 56:17 hear ^[1] 3:3 held ^[1] 23:6 herein ^[2] 37:24,25 history ^[2] 56:2,4 Honor ^[25] 7:24 8:14 9:6 10:1 11:18,25 13:16 14:15 16:20 17:1 18:5,19 19:14,25 21:2 22:24 23:12,18 24:10,16 25:17 27:5 28:25 30:15 31:12 hope ^[1] 29:1 House ^[2] 49:16,17 however ^[3] 35:5 42:23 54:10</p> <hr/> <p>I</p> <p>ideas ^[1] 49:19 identical ^[2] 34:15,21 identified ^[2] 30:22,24 ignorance ^[1] 28:10 immaterial ^[1] 23:22 immune ^[2] 4:18 29:15 immunity ^[3] 22:1,2 27:9 impact ^[1] 32:3 impair ^[1] 50:12 impairing ^[1] 50:16 implementation ^[1] 32:11 implies ^[1] 37:15 imply ^[2] 5:9,13 import ^[2] 25:25 26:10 include ^[6] 14:25 31:2 33:5 50:3 52:1 54:20 included ^[1] 30:22 includes ^[3] 12:15 47:3 51:25 including ^[7] 5:3 9:15 14:24 38:19 45:17 50:9 56:8 inclusion ^[1] 35:23 incongruities ^[1] 7:25</p>	<p>incongruity ^[1] 5:8 inconsistency ^[1] 5:23 incorrect ^[3] 20:21 50:22,24 incurred ^[1] 30:17 Indeed ^[2] 32:6 39:23 independent ^[1] 3:21 indications ^[2] 36:1,2 indirectly ^[1] 31:23 inequitable ^[1] 42:5 inequity ^[2] 19:8,21 infer ^[2] 34:9 54:15 initiates ^[1] 44:20 inject ^[1] 24:7 inquiry ^[1] 49:13 instance ^[2] 7:17 13:21 instances ^[2] 7:23 9:1 instead ^[2] 3:14 20:12 insulate ^[3] 3:15 8:18 56:24 integrated ^[2] 3:25 6:16 intended ^[4] 9:13 15:14 25:6 26:14 interact ^[1] 40:9 interpret ^[1] 53:18 interpretation ^[12] 4:10 6:3 15:8 20:7 25:25 26:7 27:3 31:16,18 32:9 52:16 54:5 interpreted ^[2] 37:13 55:14 interrupted ^[1] 48:25 introduce ^[1] 55:17 intrusion ^[2] 15:13 25:5 involve ^[3] 37:10 39:4 40:4 involved ^[1] 39:13 involving ^[2] 12:19 37:14 island ^[3] 4:11 7:10 40:19 isn't ^[2] 20:15 38:20 issue ^[4] 11:3 23:19 33:13 42:24 itself ^[14] 3:15 5:4 8:18 23:8 27:9,12 29:11,16 40:14 45:18,23 47:3 56:18,24</p> <hr/> <p>J</p> <p>judgment ^[1] 49:6 judgments ^[1] 37:7 judicially ^[5] 13:13,20 14:9 28:19,21 Judiciary ^[1] 49:18 Justice ^[154] 1:22 3:3,10 5:6 6:2 7:13,13,15,16 8:7,25 9:18 10:9,10,10,12,25 11:4,16,19,23 12:23,25,25 13:1 14:16 15:23,24,24 16:1,3,21,23 17:2,8,15 18:6,8,12,17 19:7,16,20,23 20:1,1,2 21:15 22:12,15 23:11,13,13,15,21 24:3,5,11,17 25:8,15 26:20,21,21,23,24 27:18 28:4,6,6,8 29:6,19 30:6 31:8,10 32:13,18 33:22 34:4,13,17 35:15,21 36:4,6,7,</p>	<p>8,15,19 37:2,18 38:3,4,4,6 39:18 40:15,16,16,17 41:5 42:10 43:4,20,22,22,24 44:4,9,13,21 46:2,6,10,12,12,13,15,21,23 47:5,15,24 48:8,25 49:21,22,22,24 50:20 51:7,24 52:5,19,20,20,22,23,25 53:13,20,25 54:12,21,23,23,25 55:1,4,5,10 56:12 57:11 justification ^[1] 47:2 justified ^[3] 34:8,10 35:7</p> <hr/> <p>K</p> <p>Kagan ^[16] 20:1,2 21:15 22:12,15 23:11 46:12,13,22,23 47:5,15,24 48:8,25 49:21 Kavanaugh ^[10] 26:22,23 28:4 52:21,22,25 53:20,25 54:12,21 key ^[2] 6:18 55:23 kill ^[1] 41:18 kind ^[4] 6:10 20:15 24:12 39:11 kinds ^[4] 38:19,21 39:20 40:7 known ^[2] 17:23 27:20</p> <hr/> <p>L</p> <p>lack ^[2] 18:20 53:11 language ^[11] 6:18 14:25 20:9,20,23 33:13 35:17,23 38:8 42:25 43:3 large ^[1] 40:6 last ^[4] 39:25 50:25 51:1,2 law ^[32] 11:12 12:18 14:21 15:10,18 19:15 21:13 22:10 23:3,7 24:20 26:11,12 27:20 37:7 38:24 39:5,6 50:3,6 51:13,18,23 52:7,7,8,10,15 55:25 56:8,19 57:6 laws ^[3] 24:15 26:3 40:9 lawyers ^[1] 39:2 leachate ^[2] 38:23,24 lead ^[1] 39:20 leading ^[1] 29:18 leaves ^[1] 16:7 left ^[1] 12:17 legal ^[3] 17:18 33:17 40:8 legislative ^[1] 56:4 legitimate ^[1] 41:13 lemonade ^[1] 20:5 lemons ^[1] 20:5 less ^[1] 54:9 liability ^[107] 3:15,23 4:2,3,6,6,8,14,17,19,25 5:2,20 6:19,22,23,25 7:2,3 8:18 9:9,16 10:17 11:6,9 12:3,13,18 13:5,9 16:7,8,12,12,14,15,20 17:1,3 18:4,9,24,25 20:10,14 21:4,6,9,9,12,12,13,17,17,24 22:6 23:4,5,5 25:21,21,23 26:18,19 27:21,</p>	<p>22 28:3 29:4,15 30:14 31:6,21 32:24 33:7,11,16,17,25 34:1,2,4,18,19,22,24 35:4,6,12,13 40:23 42:18,20 43:9,12 46:18,20 47:10,20 50:2 52:15 55:15,24,24,25 56:1,5,24 liable ^[2] 10:20 48:12 lid ^[1] 44:15 light ^[2] 6:14 31:14 likely ^[1] 53:8 limit ^[4] 33:7 37:13,16 53:1 limitation ^[1] 54:16 limitations ^[2] 8:9 9:22 limiting ^[1] 33:13 line ^[1] 56:21 list ^[2] 6:6 45:13 litigating ^[1] 47:7 litigation ^[4] 13:18 14:4,10 29:3 little ^[1] 14:11 long ^[1] 32:11 look ^[7] 6:21 12:14 22:5 24:15 35:7 38:15,17 looked ^[1] 39:14 looking ^[2] 33:23 54:2 looks ^[1] 45:5 lose ^[1] 32:8 lot ^[5] 29:24 39:2,9 40:3 41:7</p> <hr/> <p>M</p> <p>made ^[4] 3:11 14:14 19:5 39:24 magnitude ^[1] 25:9 manufactures ^[1] 4:16 Many ^[2] 16:13 33:9 Maryland ^[1] 1:19 Massachusetts ^[1] 50:11 matter ^[7] 1:14 41:12 44:19 47:12 48:2,24 51:20 matters ^[4] 6:23 13:11 21:17 22:6 mean ^[42] 7:22 8:12,13,15 9:4,6,10 10:18 11:21 14:1 15:1,8,20 16:18 17:5 18:15,22 21:12,18,21 22:5 23:19 24:17 25:4,19 26:5 27:5,18,25 29:22 30:11 35:16 38:8,12,13,14 39:8,13 47:6 52:1,2 55:14 meaning ^[9] 4:13 7:4 9:16 26:17 31:21 32:24 35:24 40:13 46:15 means ^[7] 7:2 21:13 24:21 25:18 35:12 52:17 54:6 meant ^[10] 14:22 20:16 21:9 23:9 25:12,12 42:8,13,22 48:4 mentioned ^[1] 35:17 might ^[9] 10:20,22,22 39:10,15 44:16 49:8,10,11 mileage ^[1] 41:7 mind ^[1] 56:5</p>
--	--	---	---	---

Official - Subject to Final Review

<p>minute [2] 31:10 55:1 missing [1] 18:4 Mm-hmm [1] 29:6 model [3] 12:14 29:11 32:6 modeled [1] 11:15 modern [1] 11:3 moment [1] 24:12 Monday [1] 1:12 morning [1] 49:24 most [4] 17:20 32:23 34:7 54:18 motion [1] 41:10 much [2] 18:2 50:6 must [2] 35:4 56:25</p> <hr/> <p style="text-align: center;">N</p> <p>natural [1] 54:18 naturally [2] 4:2 32:23 nature [2] 35:3,6 Navy [2] 40:21 41:8 necessarily [5] 21:16 30:9 31:2 37:15 48:24 need [2] 23:16 27:21 needed [1] 14:25 negative [1] 32:3 neither [1] 34:3 never [6] 18:6 19:2 21:23 22:3 30:21 48:13 nevertheless [1] 3:18 new [1] 55:17 next [3] 3:4 4:15 12:8 non-CERCLA [3] 15:9 23:1 32:1 non-settling [2] 43:19 48:7 None [1] 4:20 normal [2] 26:17 54:14 Nothing [4] 11:24 38:25 51:3 55:3 notice [1] 53:12 notion [1] 8:3 nuisance [1] 44:16 numbers [1] 20:13 numerous [1] 9:14</p> <hr/> <p style="text-align: center;">O</p> <p>obligation [2] 33:18 45:11 obligations [1] 17:18 obvious [2] 20:15 23:9 obviously [1] 53:3 occurrence [1] 37:9 offset [1] 13:5 often [3] 16:11 33:4 53:3 Okay [4] 12:23 24:11 38:13 47:15 omission [1] 35:23 once [2] 12:5 14:5 one [19] 4:14 7:8,25 11:25 15:6 20:7 27:22 30:15 34:17,18 39:3 41:19 42:25 44:14,16 45:10 47:2 48:2 54:10 ones [1] 50:10 only [11] 14:7 19:6 21:10</p>	<p>23:24 30:24 32:10 36:16 39:6,10 40:19 55:22 open [2] 52:11,18 operate [3] 9:14 42:13 49:20 opinion [1] 40:1 opposed [1] 30:2 opposing [1] 53:9 opposite [2] 36:1 47:8 option [1] 11:11 options [1] 52:17 oral [7] 1:15 2:2,5 3:7 32:16 55:18 57:8 order [4] 8:18 30:15 33:3 56:23 ordinarily [3] 25:20 26:5 29:10 Ordot [4] 3:12 32:5 41:9 56:25 other [31] 7:17,20,23 8:25 9:1,1 14:24 15:4,5 21:5 22:7,7 24:22 26:2,3,8,10 32:4,23 33:6,9 36:13,18 39:5 43:1 44:2 45:17 46:18 49:1 53:14 55:25 otherwise [1] 21:24 out [19] 5:8,8 11:24 13:22 14:6,8 15:17 17:9 20:5 21:4 25:4 29:10,11,20 37:8,21 41:7 47:20 48:21 outside [1] 27:2 over [4] 7:20 21:3 29:3 56:9 overcome [1] 35:25 override [5] 15:5,11 26:3 31:24 42:23 own [7] 3:15 14:20 16:4 31:24 32:6 44:10 56:24</p> <hr/> <p style="text-align: center;">P</p> <p>p.m [1] 57:14 PAGE [4] 2:2 37:3 45:18 56:3 pages [1] 45:14 paragraph [18] 4:15 13:8,15 14:17,19,23 17:7 19:18 24:20 37:5,11,22,23 51:17,22,25 52:9 56:10 paragraphs [3] 11:22 14:24 37:4 part [3] 3:25 6:16 40:20 particular [3] 48:19,22 49:7 parties [11] 7:19 13:18 28:23 29:3,7 40:4 43:18,19 48:7,16 52:12 parties' [3] 3:17 4:23 57:3 party [7] 16:8 22:1 33:17 49:11 52:6,13,18 party's [1] 31:5 paste [1] 55:21 pay [2] 32:5 33:18 penalties [4] 12:2,2 36:13,17</p>	<p>pending [2] 13:18 14:3 people [4] 10:18 22:6,25 39:9 perfect [2] 14:14 22:16 perfectly [1] 7:5 perform [1] 33:18 perimeter [1] 38:22 permit [3] 45:4,7 56:15 person [4] 24:21 33:24 44:19 51:5 Petition [2] 37:4 50:21 Petitioner [6] 1:4,20 2:4,10 3:8 55:8 phrase [9] 4:2,13 6:18,25 9:15 13:14 21:6 31:20 35:2 phrases [2] 34:15,22 pick [2] 43:8,12 picks [1] 53:13 plain [1] 5:1 plausible [2] 48:1 54:9 please [3] 3:10 19:23 32:19 ploy [1] 57:9 point [10] 6:9,12 24:18 34:12 35:9 37:18 39:22,25 47:13 52:6 pointing [1] 15:19 points [2] 5:8,8 pollutants [5] 30:25,25 45:4,6 56:14 portion [2] 42:6 57:2 position [19] 4:23 5:7,9 8:20 9:7 10:4,8,14,25 21:23 22:4 24:14 29:18 30:13 39:19 44:11 47:7 53:6 55:19 possible [1] 22:12 potential [1] 54:3 practical [2] 25:10 39:20 preclusion [1] 37:7 preempt [3] 24:24 50:13 52:16 preempted [1] 50:7 preemption [2] 49:25 52:10 preemptive [2] 24:13 50:21 premise [2] 50:21 54:11 presented [2] 12:22 16:2 preserves [1] 18:21 presumably [1] 42:19 presume [2] 15:14 25:6 presumption [1] 35:22 pretty [4] 29:14,24 39:8 50:6 primarily [1] 36:10 principles [8] 4:5 8:5,21 22:11 23:3,8 31:15 56:20 prior [1] 14:10 probably [2] 18:3 34:7 problem [14] 7:21 8:8 11:8 20:7 27:13,15,16 40:21 41:20,20 51:15 52:4 54:4 55:22 problems [6] 15:6 26:15</p>	<p>27:1,25 39:20 40:11 procedure [1] 41:18 proceed [3] 5:25 41:14 45:24 proceeded [2] 29:13 41:1 process [1] 41:16 prohibited [1] 45:7 prompted [1] 44:14 protection [2] 38:22 48:17 proves [1] 35:22 provide [3] 37:25 39:19 43:17 provided [4] 24:18 37:24 45:14 48:5 provides [1] 13:4 providing [1] 48:15 provision [22] 4:1 6:4,17,24 7:9 9:13 20:8,9 21:5 22:20 24:23 25:7 26:16 28:2 33:7,13 34:7 41:25 42:1,15 49:19 54:14 provisions [17] 6:13,15 7:12 9:2 15:5 18:18 22:7 26:11 33:9 36:14,25 42:13,22,24 45:13,15 50:23 purpose [1] 41:3 purposes [4] 9:3 10:15 23:22 38:16 pursuant [1] 30:8 pursue [1] 11:11 pursued [1] 8:17 putting [1] 43:7</p> <hr/> <p style="text-align: center;">Q</p> <p>qualifiers [1] 54:20 qualifies [1] 40:2 qualify [1] 30:16 question [24] 5:16 8:15 10:13 11:7 12:22 13:2 16:2,5 21:22 22:8 23:17,25 28:9 33:15 37:19 39:17 45:12,20 46:5 47:18,23,24 49:25 53:4 questions [4] 5:5 33:21 53:14 54:25 quibbling [1] 17:9 quite [7] 6:5,7 15:18 38:20 40:22 44:5 50:15</p> <hr/> <p style="text-align: center;">R</p> <p>raised [1] 37:19 rather [4] 35:10 41:25 49:13 50:17 reach [1] 7:19 Read [10] 4:1 6:17 38:9 39:12 43:7 48:11 50:4,14 51:11,25 reading [5] 4:3 31:13 39:9 51:10 54:18 reads [1] 50:2 ready-made [1] 32:7 real [1] 32:2 really [4] 10:7 20:4 29:16 38:25</p>	<p>reason [9] 7:3 12:20 20:5 31:4 40:19 44:22 47:25 49:15 54:8 reasoning [1] 20:19 reasons [4] 3:22 41:13 44:21 48:1 reassurance [1] 39:19 REBUTTAL [3] 2:8 55:5,7 receive [1] 22:2 recent [1] 9:6 recognized [2] 8:6 14:13 recover [3] 28:17 41:23 57:2 recovery [10] 6:1 10:2 15:12 25:1 27:17 31:24 36:13,16 41:24 42:1 refer [3] 42:17 43:5 45:16 reference [1] 47:3 references [1] 20:25 refers [5] 4:3 14:18,18 28:12 38:9 regard [2] 7:11 43:13 regardless [1] 32:21 regime [2] 26:10 50:7 regimes [3] 15:12 24:25 27:17 related [3] 17:22 37:17 38:2 relationship [1] 13:2 relatively [1] 9:6 release [6] 17:24,25 18:7,19 30:18 46:2 releases [17] 17:21 18:13 releasing [2] 45:3,6 relevant [1] 36:25 relied [1] 57:7 relinquished [1] 19:2 relying [1] 37:22 remand [1] 23:20 remedy [2] 41:21 45:25 remove [1] 12:10 require [5] 4:5,17 22:14 23:4 25:20 required [4] 10:4 24:1 41:9 49:11 requirement [1] 14:20 requires [5] 3:23 10:15,16 23:8 46:9 requiring [1] 26:17 reserves [1] 56:7 resolution [6] 3:23 4:5 18:25 26:17 27:22 31:5 resolve [8] 4:24 12:3,12 16:12,14,25 18:4 55:14 resolved [22] 4:2,14 6:18,25 7:2 12:1 16:24 17:2,11 21:6,8,11 26:15 31:6 33:16,25 34:18,19,22,24 35:12 55:23 resolves [9] 5:20 9:15 17:18,21 18:8,24 31:20 33:17 54:7 respect [9] 12:4,18 13:23,24 48:6,7 52:14 55:11,16</p>
--	---	--	--	--

Official - Subject to Final Review

<p>respective ^[1] 40:23</p> <p>Respondent ^[4] 1:7,23 2:7 32:17</p> <p>response ^[53] 4:25 5:2,15 12:4,19 20:14,24,24 28:12, 20,24 29:21 30:1,7,11,11, 16,16,23 31:6 32:25,25 33: 5,12,18 34:5,9,25 35:2,18, 20 36:16,17 38:9,11,16,18 39:23 40:2 43:6,6,12,13 44:8,15,16,17,22 45:16 46: 20 50:2,15 54:19</p> <p>responsibility ^[1] 42:7</p> <p>responsive ^[2] 29:1 44:1</p> <p>result ^[2] 4:13 27:2</p> <p>retained ^[1] 19:9</p> <p>Richfield ^[1] 39:25</p> <p>rights ^[3] 23:1 48:6,16</p> <p>ripped ^[1] 4:12</p> <p>rise ^[1] 32:20</p> <p>ROBERTS ^[28] 3:3 5:6 6:2 7:13 10:10 12:25 15:24 20: 1 23:13 26:21 28:6 31:10 32:13 33:22 34:13,17 35: 15 36:4 38:4 40:16 43:22 46:12 49:22 52:20 54:23 55:1,5 57:11</p> <p>role ^[2] 3:15 56:25</p> <p>rule ^[10] 6:13 7:6,7 9:11 12: 21 23:8 30:9 31:19 53:22 54:14</p> <p>rules ^[1] 31:24</p> <p>ruling ^[1] 32:3</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same ^[12] 7:20 10:22 11:12, 13 16:13 19:3,4 25:23 31: 21 37:8,9 46:24</p> <p>savings ^[1] 51:8</p> <p>saying ^[7] 9:21 11:6 38:16 47:16 49:1 50:11 57:3</p> <p>says ^[13] 15:21 20:10,13 21: 11,17 37:5,12 41:22 42:25 47:7 51:2,19 56:10</p> <p>second ^[11] 4:22 10:13 11: 7 12:21 16:2 33:15 35:9 40:3 49:5 51:1 53:16</p> <p>Secondly ^[2] 41:13 56:6</p> <p>Section ^[23] 3:22,25 4:11, 15 5:10,12,19 6:1 8:6 10:3 13:3 16:9 20:13 28:15 31: 13,21,23 32:20 42:25 45: 18 49:6,14 51:3</p> <p>see ^[4] 12:23 13:2 32:2 39: 17</p> <p>seeking ^[1] 9:19</p> <p>seems ^[2] 35:11 44:20</p> <p>sense ^[9] 4:21 6:17 13:22 14:8,14 22:16 37:20 43:15, 16</p> <p>sentence ^[4] 33:24 50:25 51:1,2</p> <p>separate ^[1] 23:19</p> <p>seriously ^[1] 50:12</p>	<p>sets ^[1] 14:20</p> <p>settle ^[8] 10:18 13:9,19 15: 9 22:1 25:21 29:8 48:13</p> <p>settled ^[3] 4:19 11:13 37:5</p> <p>settlement ^[46] 3:18 4:24 5:17,24 7:19 8:3,22 10:6, 14 11:8,10 12:12,17 13:11, 23 14:7,9 16:6,11,13 17:17, 21 18:21 19:6 21:18 22:9, 19 24:1 26:7 27:11 28:22 30:21 32:6 33:10,16,19,23 36:11,21,23 37:5 43:16 49: 8,9 50:14 57:4</p> <p>settlements ^[10] 13:13 14: 2 22:19,22,24 48:5,6,10 50: 3,5</p> <p>settles ^[2] 24:21 33:17</p> <p>settling ^[6] 16:7 22:25 27:7 32:1 43:18 52:18</p> <p>seven ^[1] 39:11</p> <p>SG ^[1] 24:6</p> <p>shall ^[4] 14:21 24:20 51:4, 18</p> <p>share ^[2] 32:5 42:5</p> <p>shouldn't ^[2] 9:22 44:19</p> <p>show ^[3] 42:12 45:15 50:23</p> <p>side ^[1] 38:7</p> <p>signal ^[2] 43:8,11</p> <p>significant ^[2] 15:19 56:19</p> <p>silence ^[2] 53:16 54:13</p> <p>silent ^[3] 35:5 54:14 55:15</p> <p>simple ^[1] 40:18</p> <p>simplest ^[1] 44:22</p> <p>simply ^[6] 4:24 28:1 35:5 37:20 49:18 52:6</p> <p>situation ^[3] 8:14 13:17 25: 2</p> <p>skipped ^[2] 21:3 56:9</p> <p>small ^[1] 40:19</p> <p>Solicitor ^[1] 1:21</p> <p>solution ^[1] 32:7</p> <p>solve ^[1] 41:19</p> <p>somebody ^[1] 10:22</p> <p>somehow ^[3] 27:10,23 57: 4</p> <p>sometimes ^[1] 44:7</p> <p>somewhat ^[1] 36:10</p> <p>sophisticated ^[1] 40:4</p> <p>sorry ^[2] 14:18 19:16</p> <p>sort ^[2] 6:6 30:9</p> <p>Sotomayor ^[24] 15:25 16:1, 21,23 17:2,8,15 18:6,8,12, 17 19:7,16,20,23 43:23,24 44:4,9,13 46:2,6,10 56:13</p> <p>sought ^[1] 3:20</p> <p>sounds ^[1] 42:3</p> <p>specific ^[1] 29:10</p> <p>specifically ^[2] 37:23,25</p> <p>spell ^[5] 13:22 14:6,8 29:10, 11</p> <p>spelled ^[1] 15:17</p> <p>spells ^[2] 21:4 25:4</p> <p>squares ^[1] 4:4</p> <p>stage ^[1] 41:11</p>	<p>stake ^[1] 31:17</p> <p>starts ^[2] 6:21 38:16</p> <p>state ^[24] 13:20 15:7,10 24: 14,22 25:5 26:3,11 27:17 29:8 38:10,24 39:5 40:5 44:6,17 50:3,6,12 52:7,7,8, 15,17</p> <p>STATES ^[41] 1:1,6,16 3:5, 11,17 4:20 5:7 8:1,16 11: 11,14 12:7 13:19,25 15:21 19:2 24:25 25:4 27:8 28: 16 29:9,13,23 32:3,7 33:25 34:19,20,23,24 39:15 40: 24,25 41:1 42:6,18 50:3,9 56:22 57:9</p> <p>States' ^[9] 4:9,22 15:12 29: 18 31:24 37:13,16 38:1 56: 7</p> <p>statute ^[22] 3:20 6:20 8:9, 24 9:17,21 22:2,18 27:8,22, 24 32:23 33:2 38:8,11 40: 14 43:14 44:2 46:9 50:23 52:3 54:6</p> <p>statutes ^[10] 17:19 26:2 33: 6 36:18 37:10 39:13,14 44: 6,10 45:17</p> <p>statutory ^[7] 6:3,6 12:2 20: 7 54:5,13 56:2</p> <p>steer ^[1] 3:12</p> <p>step ^[2] 31:16 42:2</p> <p>still ^[2] 16:23 45:7</p> <p>stone ^[1] 41:19</p> <p>strange ^[1] 15:20</p> <p>strategic ^[1] 3:11</p> <p>street ^[1] 19:1</p> <p>strongest ^[1] 18:14</p> <p>subchapter ^[1] 38:17</p> <p>subject ^[3] 8:1 13:10 51:20</p> <p>submitted ^[2] 57:13,15</p> <p>subsection ^[3] 42:11 43:5 51:4</p> <p>substances ^[4] 30:19,22 31:3 56:18</p> <p>substantiate ^[1] 42:14</p> <p>substantive ^[1] 40:14</p> <p>succeed ^[1] 23:22</p> <p>sudden ^[1] 17:1</p> <p>sue ^[12] 3:13,13 7:20 12:7, 15 18:10,20 19:3,10,12 28: 16 53:11</p> <p>sued ^[1] 56:23</p> <p>suggest ^[1] 22:21</p> <p>suggested ^[1] 48:8</p> <p>suggestion ^[1] 53:10</p> <p>suggests ^[1] 35:24</p> <p>suing ^[1] 22:7</p> <p>suit ^[2] 8:2 18:22</p> <p>sum ^[1] 32:9</p> <p>sun ^[3] 35:13 38:20 40:2</p> <p>superfluidity ^[1] 13:25</p> <p>SUPREME ^[2] 1:1,15</p> <p>SURI ^[43] 1:21 2:6 32:15,16, 18 34:3,16,21 35:21 36:15, 22 37:3 39:18 41:5 42:21</p>	<p>43:11 44:3,5,11 45:12 46: 4,8,13,21 47:1,6,11,21,25 48:14 49:4,21 50:20 51:16 52:5,23,24 53:20 54:3,13, 22 55:2,3</p> <p>surround ^[1] 7:11</p> <p>surrounding ^[2] 6:15 7:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talks ^[1] 28:14</p> <p>tear ^[1] 12:10</p> <p>technical ^[1] 38:21</p> <p>tee ^[1] 42:7</p> <p>tells ^[3] 15:2 22:5 35:3</p> <p>tempted ^[1] 38:19</p> <p>term ^[17] 5:10,13 6:8,8 29: 21 30:12 31:1,7 32:25 33: 5 34:9 39:23,24,25 44:8 54:19 55:23</p> <p>terms ^[7] 5:1 8:24 20:23 33: 10 40:18 44:23 54:15</p> <p>territorial ^[1] 40:5</p> <p>territories ^[1] 50:9</p> <p>TERRITORY ^[2] 1:3 3:4</p> <p>textual ^[2] 35:11 54:17</p> <p>textually ^[1] 54:9</p> <p>themselves ^[1] 17:6</p> <p>theories ^[1] 49:2</p> <p>theory ^[3] 6:3 12:7 47:19</p> <p>there's ^[19] 5:22 7:3,23 9:4 13:17 22:9 23:16,19 28:18, 19,20 33:12 34:16 35:10, 13 37:18 52:10 53:11 57:5</p> <p>thereafter ^[1] 6:24</p> <p>therefore ^[4] 15:11 35:7 48:5 49:12</p> <p>thinking ^[2] 53:7,14</p> <p>Thomas ^[12] 7:14,15 8:7, 25 9:18 10:9 36:6,7,15,19 37:2 38:3</p> <p>though ^[1] 54:1</p> <p>thoughts ^[1] 50:19</p> <p>thousands ^[1] 39:3</p> <p>three ^[2] 39:6,10</p> <p>throughout ^[3] 6:19 9:16 31:21</p> <p>throws ^[1] 9:12</p> <p>thrust ^[1] 39:17</p> <p>tied ^[1] 28:2</p> <p>today ^[2] 55:13 57:8</p> <p>together ^[3] 18:19 42:14, 22</p> <p>tolling ^[1] 40:13</p> <p>touch ^[2] 23:17 24:8</p> <p>tough ^[1] 39:8</p> <p>track ^[1] 20:25</p> <p>traditional ^[3] 4:4 8:21 31: 15</p> <p>transaction ^[1] 37:9</p> <p>trap ^[5] 27:5 31:25 53:12, 21 54:1</p> <p>treat ^[1] 47:21</p> <p>trigger ^[12] 3:24 5:24 7:23 8:3,22 9:8 15:10 16:8 24:</p>	<p>23 26:8 27:11 29:4</p> <p>triggered ^[3] 3:18 4:18 5: 18</p> <p>triggering ^[1] 23:1</p> <p>triggers ^[2] 4:7 27:23</p> <p>trouble ^[1] 38:6</p> <p>true ^[8] 38:21 41:10,12 48: 2,19,24 52:13 57:1</p> <p>truth ^[1] 47:11</p> <p>try ^[1] 25:20</p> <p>trying ^[2] 29:20 43:16</p> <p>turn ^[2] 7:19 51:14</p> <p>turned ^[1] 48:20</p> <p>Turning ^[1] 33:15</p> <p>two ^[9] 3:21 34:15 37:7 41: 18 42:23 45:9 49:4 50:22 52:17</p> <p>two-way ^[1] 19:1</p> <p>typical ^[1] 17:23</p> <p>typically ^[1] 29:2</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. ^[1] 19:9</p> <p>uncertain ^[1] 48:12</p> <p>uncertainty ^[2] 54:6,7</p> <p>under ^[103] 3:14,20 4:25 5: 3,7,10,11,18,20,25 8:2,11, 17,19 9:1,2,23,25 10:3 11: 12,17 12:7,18 13:6 14:19 15:9,18 16:9,15,15 17:18 18:22 19:10,15,17 20:11 21:4,13 22:2 24:2,19,22,22 25:23 26:6,9,11 27:7,22,23 28:16 29:12,14,16 30:13, 24,25 31:3 32:22 33:6,10, 11,12 34:2,19,20 35:13,19 36:13,17 37:6 38:10,20 39: 5 40:1,12,24 41:2,14,23,25 42:20,25 43:9,14 45:11,17, 24,24 49:7,14 50:3 51:11, 17,22 52:7,9,15 54:20 55: 25 56:8,19,23</p> <p>underlying ^[2] 32:22 33:2</p> <p>understand ^[7] 8:15 22:16 24:6,6 25:9 50:1 51:10</p> <p>understood ^[2] 46:14,16</p> <p>undertaken ^[3] 28:24 30:8 33:3</p> <p>underway ^[1] 41:16</p> <p>UNITED ^[43] 1:1,6,16 3:5, 11,17 4:9,20,22 5:7 8:1,16 11:11,14 12:6 13:19,25 15: 21 19:2 27:8 28:16 29:9, 13,18,23 32:3,7 33:25 34: 18,20,23,24 37:13,16 38:1 40:23,25 41:1 42:6,18 56: 7,21 57:9</p> <p>unknown ^[2] 12:16 17:23</p> <p>unless ^[2] 15:14 27:13</p> <p>unlimited ^[1] 39:24</p> <p>unnecessary ^[1] 41:21</p> <p>unprecedented ^[2] 4:16 27:19</p> <p>unrelated ^[1] 37:14</p>
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Official - Subject to Final Review

unstated ^[1] 54:16 untenable ^[1] 4:13 unthinkable ^[1] 35:12 until ^[4] 9:6,10 47:8,13 unusual ^[3] 18:23 29:17 30:20 unwary ^[5] 27:5 31:25 53: 12,21 54:1 up ^[11] 9:6 12:3,10 31:11 39:14 43:9,12 47:8 50:16 53:13 55:2 urge ^[1] 12:21 uses ^[7] 6:24 20:12,20,23 21:6 33:4 45:15 usher ^[1] 53:5 using ^[3] 3:16 38:7,22 <hr/> V <hr/> vacuum ^[1] 7:10 valid ^[1] 11:2 value ^[1] 17:9 versus ^[1] 3:5 view ^[2] 5:23 31:13 violation ^[1] 56:15 violations ^[2] 37:14,17 VIVEK ^[3] 1:21 2:6 32:16 voluntarily ^[2] 13:18 29:8 <hr/> W <hr/> wake ^[1] 10:5 walk ^[1] 36:24 wanted ^[11] 5:14 24:6 33:6 35:1 43:8,12 46:14 53:1,4, 5 56:1 wants ^[4] 52:6,8 56:22 57: 1 war ^[1] 8:4 Washington ^[2] 1:11,22 waste ^[1] 12:10 Water ^[37] 3:14,18 4:24 5: 17 8:2,11,19 9:20,24 10:6 12:1 16:16,24 19:10,15 24: 1 27:10 29:14 30:21 31:1, 5 36:11 41:2,15,17,20 43:9, 10 44:25 45:3,17,25 46:1 56:14,15,23 57:4 way ^[11] 9:13 17:19 18:21 33:1 34:10 38:9 39:12 42: 12 45:2 46:19 48:11 welcome ^[2] 5:5 33:21 well-known ^[1] 30:12 whatever ^[1] 17:22 whatsoever ^[1] 35:13 Whereupon ^[1] 57:14 whether ^[9] 5:17,20 16:5 20:3 23:21,25 28:23 32:21 38:23 whole ^[3] 8:2 9:12 51:3 will ^[5] 3:3 16:13,14 53:22, 23 wind ^[1] 50:16 within ^[2] 21:5 30:23 without ^[5] 7:11 10:22 43: 13 45:4,7	wondering ^[1] 20:3 word ^[3] 44:1 45:16 54:10 worded ^[1] 42:12 words ^[9] 17:9 32:24 37:22 38:18 39:5,15 46:18 53:14 55:21 work ^[2] 18:18 42:22 works ^[1] 28:11 worried ^[2] 22:25 39:21 worse ^[1] 55:22 wrap ^[2] 31:11 55:2 wrench ^[1] 9:12 written ^[2] 49:16,17 Wyoming ^[1] 50:11 <hr/> Y <hr/> years ^[3] 39:6,10 41:17 yourself ^[1] 5:12
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